TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 196.

AMOS GOULD, PLAINTIFF IN ERROR,

vs.

HENRY DAY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

FILED OCTOBER 19, 1874.

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1 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Michigan, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit court before you between Henry Day, plaintiff and defendant in error, and Amos Gould, defendant and plaintiff in error, a manifest error hath happened to the great damage of the said Amos Gould, the defendant and plaintiff in error, as by his complaint appears: We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly,
2 you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in the said Supreme Court to be then and there held, that, the records and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief-Justice of the said Supreme Court the 27th day of July, A. D. 1874.

ADDISON MANDELL,
Clerk of the Circuit Court of the United States
for the Eastern District of Michigan.

Allowed by
JNO. W. LONGYEAR,
District Judge.

3, 4 (Indorsed:) Supreme Court of the United States. Henry Day, plff. and deft. in error, vs. Amos Gould, deft. and plff. in error. Writ of error. Filed in clerk's office July 29, 1874. A. Mandell, clk.

5 The United States of America to Henry Day, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Michigan, wherein Amos Gould is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable John W. Longyear, judge of the circuit court of the United States for the eastern district of Michigan, this 27th day of July, in the year of our Lord one thousand eight hundred and seventy-four.

JNO. W. LONGYEAR,
District Judge.

6 EASTERN DISTRICT OF MICHIGAN, *ss:*

On this twenty-eighth day of July, in the year of our Lord one thousand eight hundred and seventy-four, personally appeared Charles I. Walker before me, the subscriber, a United States commissioner for

the eastern district of Michigan, and makes oath that he delivered a true copy of the within citation to George V. N. Lathrop, by leaving a copy with his son, Geo. H. Lothrop, in his office, he being of years discretion.

C. I. WALKER.

Sworn to and subscribed the 28th day of July, A. D. 1874.

ADDISON MANDELL,
U. S. Commissioner Eastern District of Michigan.

(Indorsed:) The Supreme Court of the United States. Amos Gould, plff. in error vs. Henry Day, deft. in error. Citation. Filed in clerk's office July 28th, 1874. A. Mandell, clerk. C. I. Walker, counsel for plffs., &c.

7 Pleas before the judges of the circuit court of the United States for the sixth circuit and eastern district of Michigan, at the district court room, in the city of Detroit, of the term of June, in the year one thousand eight hundred and seventy-four, in the case wherein Henry Day is plaintiff, and Amos Gould is defendant.

Be it remembered that on the twenty-seventh day of December, in the year one thousand eight hundred and seventy, a summons was issued from said court, in the words and figures following, to wit:

Summons.

[L. S.] The President of the United States of America to the marshal of the eastern district of Michigan, greeting:

You are hereby commanded that you summon Amos Gould, who is a citizen of the State and eastern district of Michigan, if he shall be found in your district, to be and appear in the circuit court of the United States for the eastern district of Michigan, to be held at Detroit, in the said district, before the judges of the said court, on the first Monday of February next, to answer unto Henry Day, who is a citizen of the

8 State of New York, in a plea of trespass in the case to his damage fifty thousand dollars, and have you then and there this writ:

Witness the Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States this twenty-seventh day of December, in the year of one Lord one thousand eight hundred and seventy, and of our independence the ninety-fifth.

ADDISON MANDELL, *Clerk.*

J. M. & H. M. SMITH,
Plaintiff's Attorneys.

GEO. V. N. LOTHROP,
Of Counsel.

Which summons was returned duly served on said defendant, in the words & figures following, to wit:

EASTERN DISTRICT OF MICHIGAN, *ss:*

I hereby certify and return that upon the second (2) day of January, A. D. 1871, I served the within writ on the within named Amos Gould, the defendant, at the city of Owosso, in said district, by delivering to him a certified copy of the same, and showing to him this the original summons with seal of the court thereon.

JOSEPH R. BENNET, *Marshal.*
By DAVID PARKER, *Deputy.*

Services, $2.00; mileage, $5.40; copy, .50; fees, $7.90.

Afterwards, to wit, on the twenty-second day of February, in the year one thousand eight hundred and seventy-one, the said plaintiff, by J. M. & H. P. Smith, his attorneys, come into the court aforesaid, and file a declaration against the said defendant, in the words and figures following, to wit:

9 *Declaration.*

In the circuit court of the United States for the eastern district of Michigan.

HENRY DAY
vs.
AMOS GOULD.

UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

Henry Day, of the city of New York, who is a citizen of the State of New York, plaintiff, in this suit, by J. M. & H. P. Smith, his attorneys, comes and complains of Amos Gould, of Owosso, in said eastern district of Michigan, and who is a citizen of the State of Michigan, defendant in this suit, who has been summoned to answer the plaintiff in a plea of trespass on the case.

For that whereas the plaintiff heretofore, before and at the time of the committing of the grievances hereinafter mentioned, was lawfully seized of an inheritance in fee-simple in the lands and premises hereinafter set forth. And the plaintiff shows that the same were wild lands, unoccupied and unimproved, and that the title of the plaintiff thereto was derived through certain mesne conveyances, one of which was made by Cyrus F. Jackson, and Jerusha K. Jackson, his wife, then of Worcester County, in the State of Massachusetts, as grantors to Mrs. Anna D. Anthony, her heirs and assigns forever, as grantee; that said
10 deed has never been recorded in any of the counties in the State of Michigan where any of said lands are situated, and that thereby it appeared by the records in the offices of the registers of deeds in said counties, at the time of the committing of said grievances, that the title to said lands still remained and was vested in said Cyrus F. Jackson.

The plaintiff further says that the defendant, well knowing the premises and fraudulently designing to defraud and injure the plaintiff, procured the said Jackson and his said wife heretofore, to wit, on the fifteenth day of June, A. D 1869, to execute and deliver to said defendants their power of attorney, thereby empowering the defendant, as their attorney in fact, to sell and convey the said lands and premises hereinafter set forth.

And the plaintiff further avers that afterwards, under color and by virtue of said power of attorney, the said defendant at various times wrongfully sold and conveyed certain parcels of said land to various persons, as follows, to wit: On or about the twenty-sixth day of June, A. D. 1869, to Lawrence Van Dusen and William B. Smith, of Owosso, in the State of Michigan, the northeast quarter of the northwest quarter, the southwest quarter of the southeast, quarter and the southeast quarter of the southwest quarter, all in section thirteen, of town ten north, of range one east; and on or about the second day of July, A. D. 1869, to Morris Osborn, of said Owosso, the east half of the northeast
11 quarter, the northeast quarter of the southeast quarter, the southeast quarter of the northwest quarter, the west half of the north-

west quarter, and the southwest quarter of section seventeen, in town seventeen north, of range two east; also the northeast fractional quarter, the south half of the southeast quarter, the east half of the northeast quarter, the north half of the northwest quarter, the southwest quarter of the northwest quarter, the north half of the southeast quarter, and the southeast quarter of the southeast quarter of section eleven, town eighteen north, of range one east; also entire section fifteen, and the southwest quarter of section twenty-one in town eighteen north, of range two east; also the north half, the north half of the southwest quarter, and the northeast quarter of the southwest quarter of section one, the north half of the southwest quarter of section thirteen, entire sections fifteen and seventeen, all in town twenty-one north, of range two west; and on or about the seventh day of July, A. D. 1869, to said Morris Osborn, the east half of the northeast quarter of section nine, in town sixteen north, of range three east, all of which lands are situated in the State of Michigan, and are described according to the United States survey, and in the aggregate are a large quantity, to wit, four thousand one hundred acres, and are of great value, to wit, of the
12 value of fifty thousand dollars. And the plaintiff further avers that said purchasers were purchasers for a valuable consideration, and without notice of the rights of the plaintiff; and that afterwards and within a short time after the execution of the conveyances of said lands, to wit, on the tenth day of July, 1869, said several conveyances were duly recorded in the offices of the registers of deeds of the several counties of the State of Michigan in which said lands were situated, and were so recorded before the plaintiff had any knowledge of the fact that the deed of said Jackson and wife, to said Anna D. Anthony, had never been recorded, and before the plaintiff had any knowledge of the making of said power of attorney and of said sales and conveyances under the same.

And the plaintiff avers that by said fraudulent and wrongful acts and doings the said defendant deprived the plaintiff of the said lands so sold and conveyed, and they thereby became wholly lost to him.

And whereas also, the plaintiff heretofore and at the time of the committing of the grievances hereinafter mentioned was lawfully seized of an estate of inheritance of fee simple in certain other lands and premises hereinafter set forth. And the plaintiff shows that the same were wild lands, unoccupied and unimproved, and that the title of the plaintiff to the same was derived by certain mesne conveyances, one of which was made by Cyrus F. Jackson and Jerusha K. Jackson, his wife,
13 then of Worcester County, in the State of Massachusetts, as grantors, to Mrs. Anna D. Anthony, her heirs and assigns forever, as grantee, and that said deed has never been recorded in any of the counties of the State of Michigan where any of said lands are situated, and that thereby it appeared by the records in the offices of the registers of deeds in said counties at the time of the committing of said grievances that the title of the said lands was vested in said Jackson.

The plaintiff further says that the defendant having good and reasonable cause to believe that said Cyrus F. Jackson was not the real owner of said lands, and fraudulently designing and intending to defraud and injure such real owner, who was the plaintiff, heretofore, to wit, on the fifteenth day of June, A. D. 1869, procured the said Jackson and his said wife to execute and deliver to the defendant a power of attorney, thereby empowering the defendant, as their attorney in fact, to sell and convey the said lands and premises hereinafter set forth. And the plaintiff avers that afterwards, under color and by virtue of said power of attorney, the

said defendant did wrongfully sell and convey to the persons and at the times set forth in the first count above, the said several parcels of land therein set forth and described, the same being of great quantity, to wit, of the quantity of four thousand one hundred acres, and of great
14 value, to-wit, of the value of fifty thousand dollars.

The plaintiff further says that said purchasers were purchasers for a valuable consideration and without notice of the rights of the plaintiff, and that afterwards, to wit, on the fifteenth day of July, A. D., 1869, and before the plaintiff knew that the deed of said Jackson to said Anna D. Anthony, had never been recorded as aforesaid, and before he knew of the making of said power of attorney, and of said sales and conveyances then made by the defendant, said conveyances were recorded in the counties in the State of Michigan where said lands are situated, and so, by means of said fraudulent and wrongful acts and doings of said defendant, the plaintiff was deprived of the said lands and premises so sold and conveyed, and they became wholly lost to him, to the plaintiffs damage fifty thousand dollars, and therefore he brings suit by

J. M. & H. P. SMITH,
Plaintiff's Attorneys.

GEO. V. N. LOTHROP, *of Counsel.*

Afterwards, to wit, on the third day of May, in the year of our Lord one thousand eight hundred and seventy-one, the said defendant, by E. Gould, his attorney, filed his plea to said declaration, which plea is in the words and figures following, to wit:

Plea.

In the circuit court of the United States, for the eastern district of Michigan.

HENRY DAY
vs.
AMOS GOULD.

15 And now comes the said Amos Gould by E. Gould, his attorney, and defends the wrong & injury, when &c., and says that he did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against him, and of this he puts himself upon the country.

Very truly,

E. GOULD,
Attorney for Defendant.
By C. I. WALKER,
Of Counsel.

Detroit, May 3, 1871.

Afterwards, to wit, on the 8th day of April, A. D., 1874, said plaintiff came into the court aforesaid and obtained an order of said court in the words following, to wit:

HENRY DAY
vs.
AMOS GOULD.

On motion of George V. N. Lothrop, attorney for plaintiff, it is ordered that the plaintiff be allowed to amend his declaration by correcting mis-

description and by supplying omissions of description, and that he serve a copy of the amended declaration upon the defendant's attorney.

Afterwards, to wit, on the sixteenth day of April, A. D., one thousand eight hundred and seventy-two, said plaintiff, by J. M. & H. P. Smith, his attorneys, came into court and filed his amended declaration in
16 said cause, which amended declaration is in the words and figures following, to wit:

Amended declaration.

In the circuit court of the United States for the eastern district of Michigan.

HENRY DAY }
vs. }
AMOS GOULD. }

UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

Henry Day, of the city of New York, who is a citizen of the State of New York, plaintiff in this suit, by J. M. & H. P. Smith, his attorneys, comes and by leave of the court files this amended declaration and complains of Amos Gould, of Owosso, in said eastern district of Michigan, and who is a citizen of the State of Michigan, defendant in this suit, who has been summoned to answer the plaintiff in a plea of trespass on the case.

For that whereas the plaintiff heretofore, before and at the time of the committing of the grievances hereinafter mentioned, was lawfully seized of an estate of inheritance in fee-simple in the lands and premises hereinafter set forth.

And the plaintiff shows that the same were wild lands, unoccupied and unimproved, and that the title of the plaintiff thereto was derived through certain mesne conveyances, one of which was made by Cyrus F. Jackson and Jerusha K. Jackson, his wife, then of Worcester County, in the State of Massachusetts, as grantors, to Mrs. Anna D. An-
17 thony, her heirs and assigns forever, as grantee; that said deed had never been recorded in any of the counties in the State of Michigan where any of said lands are situated, and that thereby it appeared by the records in the offices of the register of deeds in said counties, at the time of the committing of said grievances, that the title to said lands still remained and was vested in said Cyrus F. Jackson.

The plaintiff further says that the defendant, well knowing the premises and fraudulently designing to defraud and injure the plaintiff, procured the said Jackson and his said wife, heretofore, to wit, on the fifteenth day of June, A. D. 1869, to execute and deliver to said defendant their power of attorney, thereby empowering the defendant, as their attorney in fact, to sell and convey the said lands and premises hereinafter set forth.

And the plaintiff further avers that afterwards, under color and by virtue of said power of attorney, the said defendant at various times, in the names of said Jackson and of his said wife, wrongfully sold and conveyed certain parcels of said land to various persons, as follows, to wit: On or about the twenty-sixth day of June, A. D. 1869, to Lawrence Van Duzer and William B. Smith, of Owosso, in the State of Michigan, the northeast quarter of the northwest quarter, the southwest quarter of the southeast quarter, and the southeast quarter of the southwest

18 quarter, all in section thirteen (13) of town ten (10) north, of range one (1) east; and on or about the thirtieth day of June, A. D. 1869, to Morris Osborn, of said Owosso, the northwest quarter of he southwest quarter of section fourteen, the southeast quarter of the northeast quarter, and the north half of the southeast quarter of section fifteen, and the south half of the northeast quarter, and the north half of the southeast quarter of section twenty-two, (22,) all in town twenty one (21) north, of range seven (7) east; and on or about the second day of July, A. D. 1869, to said Morris Osborn, of said Owosso, the east half of the northeast quarter, the northeast quarter of the southeast quarter, the southeast quarter of the northwest quarter, the west half of the northwest quarter, and the southwest quarter of section seventeen, (17,) in town seventeen (17) north, of range two (2) east; also, the northeast fractional quarter, the south half of the southeast quarter of section one, (1,) the east half of the northeast quarter, the north half of the northwest quarter, the southwest quarter of the northwest quarter, the north half of the southeast quarter and the southeast quarter of the southeast quarter of section eleven, (11,) in town eighteen (18) north, of range one (1) east; also, entire section fifteen, (15,) and the southwest quarter of section twenty-one, (21,) in town eighteen north, of range two east; also, the north half, the west half of the southwest quarter, and the northeast quarter of the
19 southwest quarter of section one, (1,) the north half and the southwest quarter of section thirteen, (13,) entire sections fifteen (15) and seventeen, (17,) all in town twenty-one (21) north, of range two (2) west; and on or about the twenty-first day of June, A. D. 1869, to the said Morris Osborn, the entire sections thirteen (13) and twenty-three, (23,) in town twelve (12) north, of range one (1) west; and on or about the seventh day of July, A. D. 1869, to said Morris Osborn, the east half of the northeast quarter of section nine, (9,) in town sixteen (16) north, of range three (3) east; all of which lands are situated in the State of Michigan, and are described according to the United States survey, and in the aggregate are a large quantity, to wit, five thousand seven hundred and seventy-four (5,774) acres, and are of great value, to wit, of the value of fifty thousand dollars; and the plaintiff further avers that said purchasers were purchasers for a valuable consideration and without notice of the rights of the plaintiff; and that afterwards and within a short time after the execution of the conveyances of said lands, to wit, on the tenth day of July, A. D. 1869, said several conveyances were duly recorded in the offices of the register of deeds of the several counties of the State of Michigan in which said lands were situated, and were so recorded before the plaintiff had any knowledge of the fact that the deed of said Jackson and wife to said Anna D. Anthony had never been recorded, and before the plaintiff had any knowledge of the making of said power of attorney and
20 of said sales and conveyances under the same.

And the plaintiff avers that by said fraudulent and wrongful acts and doings the said defendant deprived the plaintiff of the said lands so sold and conveyed and they thereby became wholly lost to him.

And whereas, also, the plaintiff heretofore, before and at the time of the committing of the grievances hereinafter mentioned, was lawfully seized of an estate of inheritance in fee-simple in certain other lands and premises hereinafter set forth, and the plaintiff shows that the same were wild lands, unoccupied and unimproved, and that the title of the plaintiff to the same was derived by certain mesne conveyances, one of which was made by Cyrus F. Jackson and Jerusha K. Jackson, his wife,

then of Worcester County, in the State of Massachusetts, as grantors to Mrs. Anna D. Anthony, her heirs and assigns forever, as grantee, and that said deed has never been recorded in any of the counties of the State of Michigan where any of said lands are situated, and that thereby it appeared by the records in the offices of the registers of deeds in said counties, at the time of the committing of said grievances, that the title of the said lands was vested in said Jackson.

The plaintiff further says that the defendant, having good and reasonable cause to believe that said Cyrus F. Jackson was not the real
21 owner of said lands, and fraudulently designing and intending to defraud and injure such real owner, who was the plaintiff, heretofore, to wit, on the fifteenth day of June, A. D. 1869, procured the said Jackson and his said wife to execute and deliver to the defendant a power of attorney, thereby empowering the defendant, as their attorney in fact, to sell and convey the said lands and premises hereinafter set forth; and the plaintiff avers that afterwards, under color and by virtue of said power of attorney, the said defendant did wrongfully sell and convey to the persons and at the times set forth in the first count above, the said several parcels of land therein set forth and described, the same being of great quantity, to wit, of the quantity of five thousand seven hundred and seventy-four (5,774) acres, and of great value, to wit, of the value of fifty thousand dollars.

The plaintiff further says that said purchasers were purchasers for a valuable consideration and without notice of the rights of the plaintiff; and that afterwards, to wit, on the fifteenth day of July, A. D. 1869, and before the plaintiff knew that the deed of said Jackson to said Anna D. Anthony had never been recorded as aforesaid, and before he knew of the making of said power of attorney and of said sales and conveyances thereunder by the defendant, said conveyances were recorded in the counties in the State of Michigan where said lands are situated; and so, by means of said fraudulent and wrongful acts and doings
22 of said defendant, the plaintiff was deprived of the said lands and premises so sold and conveyed, and they became wholly lost to him; to the plaintiffs damage fifty thousand dollars, and therefore he brings suit by—

J. M. & H. P. SMITH,
Plaintiff's Attorneys.

GEO. V. N. LOTHROP,
Of Counsel.

Venire.

Therefore, to try the issue above joined, let a jury come thereof, by whom, &c., who neither,' &c., because as well the said plaintiff as the said defendant have put themselves on that jury.

Verdict.

And the jurors of that jury of whom mention is made, to wit, J. Dudley Mason, Willard King, Peleg Swan, Nicholas P. Watts, John Peters, William Yerrington, John D. Williams, Eber Durham, Samuel Leggett, Eugene W. Watson, John Collier, and John S. Griffin, who were elected, tried, and sworn to try the issue joined between the parties aforesaid, and after hearing the evidence adduced and the arguments of counsel, and receiving the charge of the court, retired to their room to consult of their verdict, under the charge of David D. Marshall,

an officer sworn to attend them; and after being absent for a time returned into court and say upon their oaths that the said defendant, Amos Gould, is guilty in manner and form, as the said plaintiff, Henry Day, hath in his declaration in this case complained against him,
23 and said jury assess the damages of the said plaintiff against the said defendant on occasion of the premises at the sum of thirty-three thousand and twenty dollars and sixty five cents.

And the jurors aforesaid, upon their oaths aforesaid, in answer to certain questions propounded to them in writing by the respective parties, find as follows, to wit:

As to the first question of said defendant, to wit: "1st. Was the deed from C. J. Anthony and wife, to Cyrus F. Jackson, ever delivered to said Jackson, or to any one for him?" they answer as follows: "We find no actual delivery."

As to the second question of said defendant, to wit: "2d. Did said Jackson have any knowledge, previous to the execution of said deed, that it was to be executed?" they answer as follows: "No."

As to the third question of said defendant, to wit: "3d. Did he, after its execution, in any way accept it?" they answer as follows: "Yes."

As to the fourth question of said defendant, to wit: "4th. Did the defendant when he executed the conveyance, as attorney for Jackson, have any knowledge or belief that the plaintiff had any title to lands thus conveyed, or any valid claim thereto?" they answer as follows: "Yes."

As to the fifth question of said defendant, to wit: "5th. Did the defendant when he executed the conveyance as attorney for Jackson, believe that said Jackson had the legal title to the lands so conveyed?" they answer as follows: "No."

24 As to the question of said plaintiff, to wit: "Did not the defendant Gould, at the time he sold the lands in question, have knowledge of such facts as brought to him notice that plaintiff claimed these lands, and which, if followed in good faith, would have led him to a knowledge of plaintiffs full title?" they answer as follows: "Yes."

Judgment.

It is therefore considered by the court here, that the said plaintiff, Henry Day, do recover against the said defendant, Amos Gould, the said sum of thirty-three thousand and twenty dollars and sixty-five cents, ($33,020.65,) damages assessed by the jury as aforesaid, together with plaintiff's costs of this suit to be taxed, &c.

25 The circuit court of the United States for the eastern district of Michigan.

HENRY DAY, PLAINTIFF,
vs.
AMOS GOULD, DEFENDANT.

Bill of exceptions.

Afterwards, to wit, at a session of the circuit court of the United States for the eastern district of Michigan, held at the court-room in the city of Detroit, in said district, on this day of June, A. D. 1874, before the honorable John W. Longyear, district judge, the issue joined as aforesaid in said cause came on to be tried, before a jury of

good and lawful men, duly impanneled and sworn to try the same; at which time also came as well the said plaintiff as the said defendant, by their respective attorneys, and the said plaintiff, to maintain the said issue on his part, gave evidence tending to prove the allegations contained in the several counts of his declaration; and among other
26 testimony the plaintiff gave evidence tending to show that the defendant was a lawyer, living at Owosso, Michigan, at and long before the transaction in question; that Morris Osborn, hereinafter mentioned, was at the time of the conveyances to him, hereinafter named, the son-in-law of said Gould, and lived in Owosso; that Charles J. Anthony, then lived in New York City, and Cyrus F. Jackson, was his brother-in-law, and resided in Providence, Rhode Island.

The plaintiff then proceeded to read in evidence a deposition of said Cyrus F. Jackson, taken on behalf the plaintiff, which contained the following interrogatories and answers:

"Seventh. Did you purchase any lands of C. J. Anthony, situated in Michigan, in 1865, or pay any consideration for any such lands?

"Ans. I did not.

"Eighth. Did he deliver any deed of said lands to you, or to any person for you; or have you ever seen any such deed executed by himself and wife, or recorded any such deed?

"Ans. I never saw any such deed, nor has he ever delivered
27 any such deed to me or my wife, or any person for me to my knowledge, nor have I ever recorded any such deed.

"Ninth. Have you learned that any such deed had been executed and recorded in Michigan; and, if so, when did you learn it, and from whom? I mean a deed executed by C. J. Anthony and his wife to you.

"Ans. In the summer of 1865, while I was living at Clappville, Massachusetts, C. J. Anthony, then living in Worcester, Massachusetts, and doing business in the city of New York, sent to me by Rev. James N. Sykes a deed of lands in Michigan, drawn for me and wife to execute to Mrs. Anna D. Anthony, wife of said Charles J. Anthony. That was the first I knew that there were lands standing in our names in Michigan.

"Tenth. From whom did Mr. Sykes say he brought that deed?

"Ans. From Mr. Charles J. Anthony.

"Eleventh. Were you requested by Mr. Anthony to execute it?

"Ans. I was, by him, through Mr. Sykes. Mr. Sykes was brother-in-law of myself and of Mr. Anthony.

"Twelfth. What did you do with the said deed?

"Ans. We went before a commissioner for Michigan, residing
28 in Worcester, Massachusetts. His name was Hill, J. H., I think, and executed the deed conveying the lands to Mrs. Anna D. Anthony. I acknowledged it before Mr. Hill."

But the defendant, by his counsel, then and there objected to the reading in evidence of the ninth, tenth, and eleventh interrogatories, and the answers thereto, severally, as incompetent; but the court overruled said objection and admitted said interrogatories and answers in evidence, and the defendant, by his counsel, did then and there duly except.

Said deposition also contained the following:

"Twentieth. When did you first learn that the title of any of the said lands conveyed to you by Anthony and wife as aforesaid remained in you on the record?

"Ans. I learned it in 1869, in April, from James L. Anthony.

"Twenty-first. What did he state to you then?

"Ans. He stated that his father and mother had conveyed the lands

that he spoke of to Henry Day, of New York, and that Mr. Day
29 had ascertained that two sections, Nos. 13 and 23—I think it is in township 12 N., 1 W., in Gratiot County—were still standing in my name on the record, and that Mr. Day wished me to reconvey them to him."

But the said defendant, by his counsel, then and there objected to the reading in evidence of said 21st interrogatory and answers thereto, as hearsay, to which the counsel for the plaintiff replied that it was offered only to show or identify what lands he was informed stood in his name of record; and the court overruled said objection and admitted said interrogatory and answer in evidence only for the purpose aforesaid, and the said defendant then and there duly excepted thereto.

And the said defendant, by his counsel, did further object to the admission in evidence of the twenty-third interrogatory and the answer thereto contained is said deposition, on the ground that the answer to said interrogatory was giving the contents of a written instrument. Said interrogatory and the answer thereto are as follows:

"Twenty-third. Did you inform Amos Gould, the defendant,
30 that you had the record-title to these two sections of land; and, if so, how and when?

"Ans. I did. I wrote to S. J. Harding, of Owosso, Michigan, on May 11, 1869. I think that I gave him a description of the lands that I had understood were standing in my name—the said two sections in Gratiot County—and referred him to Judge A. Gould, of Owosso."

Upon said objection being made, the plaintiff called on the defendant to produce the original of the letter to said Harding mentioned in said answer, notice to produce which on the trial it was admitted had been duly given by plaintiff to defendant; and for the purpose of showing said original in the hands of defendant the plaintiff gave in evidence a letter of said defendant to said Jackson bearing date May 22, 1869, in which was the following: "J. S. Harding has placed in my hands your letter to him dated May 17, 1869, with request that I answer it."

Defendant stated that he could not produce said original; whereupon the court overruled said objection and admitted said interrogatory and answer in evidence; to which the said defendant then and there
31 duly excepted.

The plaintiff, having given in evidence in connection with said deposition the correspondence between said defendant and said witness Jackson, proposed to read in evidence the eighty-sixth interrogatory and the answer thereto, which are as follows:

"Eighty-sixth. How much money in all has he sent you on account of lands sold?

"Ans. Seven hundred and eighty-one dollars, less the discount on the draft, I think it was."

To which the defendant, by his counsel, objected as incompetent, but the court overruled said objection and admitted said interrogatory and answer in evidence as a part of the res gestæ; to which the defendant then and there duly excepted.

Also in connection with said deposition the plaintiff offered in evidence the following deeds:

1st. A deed of the lands in question made by Charles J. Anthony and Anna D. Anthony, his wife, of New York City, to said Cyrus F. Jackson, his heirs and assigns, bearing date April 1, 1865, and recorded in July following.

32 2d. A deed of the same land referred to in said answer to the ninth interrogatory in said Jackson's deposition, made by said

Jackson and wife to Anna D. Anthony, wife of Charles J. Anthony, her heirs and assigns, bearing date June 23d, 1865, and recorded in May, 1871.

To the admission of the first-named of said deeds the defendant objected because it appears by said deposition of said Jackson as above set forth that the same had never been delivered, but the court overruled said objection and admitted said deed in evidence, and the said defendant then and there excepted thereto.

The plaintiff also gave in evidence a deed of the same lands made by Anna D. Anthony and Charles J. Anthony to Henry Day, his heirs and assigns, bearing date September 2d, 1867, and recorded in January, 1868.

The plaintiff also gave in evidence the following correspondence between the witness Jackson and the defendant:

33 *Gould to Jackson.*

OWOSSO, *May 22d*, 1869.

To C. F. JACKSON, Esq.:

DEAR SIR: S. J. Harding, esq., has placed in my hand your letter to him dated May 17th, 1869, with request that I answer it. In reply, allow me to say that town 12 N., R. 1 west, is in Gratiot County, in this State, and the northeast corner town in said county. It is one of the newest towns in the county, having no settlements of consequence. You say you have a deed of sections 13 & 23 in that town recorded. Those sections were deeded to H. Day in 1861 by A. L. & T. B. R. Road Co. Amongst the lands deeded to Mr. Day were some which he took for C. J. Anthony. It may be that Mr. Day has deeded them to you. I am a large owner of these railroad-lands in my own right, and agent for a good deal more, and am well prepared to trace out the title to any of them. If you wish, I will take measures to find out all of these lands to which you have title and sell them for you if a chance offers. I have ascertained that you have the original title to 3 40-acre lots of land in section 13, T. 10 N., R. 1 east. I suppose it has been sold for
34 taxes, but I can sell your interest for a fair price if you are willing. Please write me and say if I may sell your interest in those lots, and what I shall do generally to ascertain to what lands you have title.

Yours, truly,

A. GOULD.

Jackson to Gould.

PROVIDENCE, R. I., *May* 24, 1869.

MY DEAR SIR: When I lived in Michigan I located railroad lands for Mr. C. J. Anthony, Henry Day, and Jonathan Edwards, of New York. The scamps cheated me out of the most of my pay. You probably remember the time I was at work. In making the deeds Mr. C. J. Anthony, as I understand, left section 13 & 23, township 12 north, one west, standing recorded in my name. Mr. Day, through James L. Anthony, has written me to deed the same back to him. I have refused to do it unless he will see me paid what is my due on work done for him and others. Now what I want is this: I wish, if I am to have
35 any trouble in the matter, to employ you to look after my interests. I wrote to S. J. Harding a few days ago asking him to let me know where the land was situated. I think it is in Gratiot County.

I wish to know who is the owner of the land. If I have any title to it I will not give it up until I am well paid for my work and for waiting.

Will you inform me in regard to whether you will aid me in the matter if I have trouble with Mr. Day?

My wife has been sick for 8 months; not been able to set up any of the time more than an hour at a time.

I am, very respectfully,

C. F. JACKSON.

A. GOULD, Esq.

Gould to Jackson.

OWOSSO, MICH., *May* 26, 1869.

C. F. JACKSON, Esq.:

DEAR SIR: Yours of 24th inst. is received, and contents are noted. I have already answered your letter to S. J. Harding in regard
36 to those matters. I will aid you in the matter, and will soon advise you what to do.

I am sorry you wrote to Mr. Day as you did, but no matter. Be careful what you write, if you write any more letters. At the time those lands were deeded to Mr. Day there was a considerable quantity, say from 5 to 20,000 acres, deeded to him for Mr. C. J. Anthony. I presume these lands were deeded to you as a part of the lands to which Anthony was entitled. You had probably better claim that you got these lands through an arrangement with Mr. Anthony. It may be best for you to deed to some one else soon.

Yours, truly,

A. GOULD.

P. S. I have written to Gratoit Co. in regard to title, and to Lansing about taxes. I will write again.

Let this be confidential, and do not say to any one that I am acting for you.

A. G.

Gould to Jackson.

OWOSSO, MICH., *June* 9, 1869.

37 C. F. JACKSON, Esq.:

DEAR SIR: Referring to yours of 24th of May last, and my reply thereto, allow me to say that the register of Gratiot Co. reports to me that C. J. Anthony deeded to you sections 13 & 23, T. 12 N., R. 1 west, April 1, 1865, and afterwards, in September 2d, 1867, he deeded same lands to H. Day. When those deeds were recorded I have not learned. In order that I may aid you and protect your interests in regard to these lands and other lands similarly situated, it will be best for you and your wife to execute and acknowledge the enclosed power of attorney, and send it to me. Send me at the same time a statement of your account with Day and Anthony, for services and expenses, adding interest, and I will be sure to get or make sure to you that before I sell the property or compromise your interests. There may be other lands similarly situated in other counties, and in order to take charge of whatever there may be chance to be, I make the power of attorney broad enough to cover all of it. If the power of attorney is acknowledged before any person
38 but a commissioner for this State, it will be necessary for you to get the county clerk's certificate to it also. If you have any special instructions to give please give them in your reply. It is important that

I hear from you and have the power of attorney as soon as you can send it, and if you get any letters from Mr. Day, or any one else on the subject, you had better give no answer until you let me know what they say, and take my advice what to reply. I think I can get you something handsome out of it, and pay myself for trouble. I am looking the matter up to see if those lands have been sold for taxes. If they have, I must look to it as soon as I hear from you.

Hoping for an early reply, I am yours truly,

A. GOULD.

Jackson to Gould.

PROVIDENCE, R. I., *June* 15, 1869.

MY DEAR SIR: Yours of June 9th, is received. In reply, would say we have been before the commissioner for the State of Michigan,
39 and have executed the within power of attorney. We do it in good faith, believing that you will protect our interests and do better for us than any other would, having confidence, as we do, in your legal abilities. I send bill for labor and expenses due me from the late C. J. Anthony, Henry Day, and Jonathan Edwards. If you have any occasion to settle the business with H. Day, he will claim that he has a receipt in full from me, and I think he has. But it was got in this way: In the fall of 1861, after I got through locating those lands, C. J. Anthony wrote me to send my contract and receipt and he would send me my money. (I have his letters to prove what I say.) I sent the contract and receipt by M. L. Stewart, of Owosso. He saw Mr. Anthony; gave him the contract and receipt, and got but one hundred dollars, and Anthony held on to the receipt. Probably Mr. Stewart will remember about the matter now. I have all of C. J. Anthony's letters to me in regard to what I was to receive and the time worked. I have received in all from C. J. A. what I have them cr. with, and not one dollar more from
40 any of them. I never saw H. Day but once and he never paid me a dollar.

Do for me the best you can and settle the matter as soon as possible, as I am in want of the money. You say you can secure to me the amount of my bill, which I enclose within. Do that and pay yourself for your trouble, and you will confer a lasting favor on me and mine. If there is anything more wanted of me, please let me know and I will do all I can. I would look to this matter at once, for I fear H. Day is at work also. If I receive any more letters from him, I will forward to you before replying. Let me hear from you soon.

Am, as ever, respectfully,

C. F. JACKSON.

Gould to Jackson.

[Confidential.]

OWOSSO, MICH., *June* 24, 1869.

C. F. JACKSON, Esq.:

DEAR SIR: Yours enclosing the papers has come to hand and
41 I shall at once do what I consider necessary in the premises. My opinion is, I shall be able to get out of it your claim and send it to you in a few months. I can't say certain until I have perfected the examinations. Send me all the letters you receive, and do not answer

until instructed by me what to say. If you are asked personally about it, say you own the lands; that you have bought and paid for them.

Do not say even this unless it is necessary.

Yours, truly,

A. GOULD.

Jackson to Gould.

PROVIDENCE, R. I., *July* 19, 1869.

MY DEAR SIR: I have this moment received from James L. Anthony the following: "Your two last letters in relation to Michigan lands duly received. Will you please make out your bill in full, with credits and debits, stating the e'act time you were employed, how, & by whom, & state what constitutes all the claims you have against
42 the lands standing in your name. Upon receipt of the same I will at once see what can be done, and let you know. The bill is to include every kind of claim you may have, so that if settled there will be no further cause for disagreement, and I shall expect a deed from yourself & wife of all the lands standing in your name."

I want you to do what is right in the matter, and if Mr. Day pays me all my claims, I wish to give him the deeds of the lands.

What shall I write to him in answer?

I am, respectfully,

C. F. JACKSON.

A. GOULD, Esq.,
Owosso.

Gould to Jackson.

[Confidential.]

OWOSSO, MICH., *July* 24, 1869.

C. F. JACKSON, Esq.:

DEAR SIR: Yours of 19th inst. is received, and contents are noted. I would, were I in your place, reply to the letter of James L. Anthony, as follows:

43 "DEAR SIR: In reply to yours of inst., allow me to say that I have parted with all my interests in the Michigan lands to which you refer. My bill, to which you also refer, is all arranged, and I have no claim making it necessary to send you a bill.

"Yours, truly,"

All the above is true. I have sold and conveyed all your interest in the land which had been deeded to you, and shall have enough out of it to pay your bill and my charge for trouble. I shall get the pay within two or three months, and will be responsible for it. Some of the land had been deeded by Mr. Anthony before he deeded to you, and nearly all of it had been sold for taxes.

Let Mr. Day settle with the purchasers now. Please not write any more than I have indicated, and do not answer any other letters or converse about it until you let me know what is said to you.

Let us be very careful and all will be right.

Yours, truly,

A. GOULD.

44 *Jackson to Gould.*

PROVIDENCE, R. I., *Aug.* 7, 1869.

MY DEAR SIR: I have just received the following from James L. Anthony: "Will you please inform me who settled your bill, & oblige?" That is all he wrote. How shall I answer?

In regard to the money for my a/c, I would like it by the 10 of September, if possible. I have some money to make out then. My wife has been sick for a year the 10 of September, and I shall have a year's doctor's bill to pay. Send it as soon as you can, and oblige.

Yours, respectfully,

C. F. JACKSON.

A. GOULD, Esq.

Gould to Jackson.

OWOSSO, MICH., *Aug.* 11, 1869.

C. F. JACKSON:

DEAR SIR: Yours of 7 inst. is received, and contents are noted. I send enclosed the form of a reply to J. L. Anthony, such as I would write. I also send enclosed the form of a draft for the amount of your bill, $781, which you can make a copy of and sign and send to cashier of this bank. I will accept, and when due, on 10th Sept., will pay it. If you want the money before that time the cashier will remit it to you, less the discount. I have not got the money, but have got good paper and will advance it if I do not get it by its time.

45

Yours, truly,

A. GOULD.

(This is the draft sent by Gould in the foregoing letter:)

PROVIDENCE, *Aug.* , 1869.

JAMES L. ANTHONY:

DEAR SIR: In reply to yours of I would say that I gave a power of attorney to a gentleman in the west to convey all my interests in those Michigan lands, he to get amount of my bill and pay for trouble. He informs me that he has sold the lands and my bill is settled. I do not know to whom he sold, and can say no more as to who settled my bill. A reference to the records of the proper counties will show it all, I suppose.

46

I feel that I was badly treated about my bill, and see no more need of further correspondence on the subject.

Yours, truly,

Jackson to Gould.

PROVIDENCE, R. I., *Aug.* 13, 1869.

MY DEAR SIR: I fear I have been a little hasty in giving you power of attorney to act for me in settling my claim against H. Day & C. J. Anthony. Mr. J. L. Anthony was here to-day, & tells me that his mother gave Mr. H. Day a warranty deed of those lands, & Mr. D. will hold Mrs. Anthony for them. I do not wish to wrong Mr. A. in any way. I supposed, when I gave you that power of attorney, I was giving it for the purpose of settling with them & getting my pay, & you receiving a good round sum for your trouble.

Am I right, or not, in regard to that? Have you made a sale of the lands? If so, I see no reason why I ought not to receive my claim at once. I want it to use, & ought to have had it years

47

ago. Mr. Anthony wanted to know into whose hands I had put the matter. I did not inform him, & then he wanted me to learn at once what could be done and let him know as soon as possible. He is willing to pay me my claim, & came on with the money for that purpose.

Now I want to know just what can be done. I want my pay, and I want you to get yours, but I do not want my sister-in-law (Mrs. Anthony) to lose by the operation more than is necessary.

C. J. Anthony deeded these lands to me and my wife; we deeded them to Mrs. A. & she warranted them to H. Day; but did not get our deed recorded, and it is lost. Now I know they cannot do me any harm, & I also know that if I get my claim I shall not trouble myself much about the matter, but shall refer them to just who you say.

Please let me hear from you at once.

I am, respectfully,

C. F. JACKSON,
Providence.

A. GOULD, Esq., *Owosso.*

48 *Jackson to Gould.*

PROVIDENCE, R. I., *Sept.* 22, 1869.

MY DEAR SIR: Will you please inform me what amount of lands you have sold for me? I wish to know. I thought there was none but the 2 sections in Gratiot Co., & the 3 40-acre lots in Saginaw County. Please give me a memorandum of the amount, & where situated.

Mr. Anthony, of New York, wishes to know what the man you sold to will take, & give him a deed.

I think there will be trouble about the lands yet.

Give me a description of what you have sold, & oblige.

Yours, respectfully,

C. F. JACKSON.

To A. GOULD, Esq.

Gould to Jackson.

[Private & confidential.)

OWOSSO, MICH., *Oct.* 12, 1869.

C. F. JACKSON, Esq.:

49 DEAR SIR: Yours of 22 Sept. came to hand in my absence from home. In reply allow me to say that you & I should have nothing to say to Mr. Anthony or Mr. Day except that you have sold the land & have no more to do with the matter. Those parties, some of them, intended to cheat you out of your just rights & they have not done it. In this view, I must decline to give you a list of the lands sold. I sold all I could find to which you appeared to have the original title.

The land was all more or less embarrassed by tax-titles & other claims. The purchasers know how it stood, & take the risk.

They hope to make some money out of it, & you will have no trouble from them if you keep still & do as I advise. You may say to the other party that you have no list of what I deeded & I decline to give it. We can do ourselves no good by talking too much with the other side.

If Mr. Day or any one else talks large & threatens don't be frightened.

50 All will be right if you do not too much. Send them to me & keep me posted.
Don't show my letters to any one.
Yours, truly,

A. GOULD.

51 The plaintiff further gave in evidence the following instruments: 1st, power of attorney made by Cyrus F. Jackson and wife to defendant, dated June 14, 1869, authorizing him to sell and convey sections thirteen (13) and twenty-three (23) in township twelve north, of range one west; also the northeast quarter of the northwest quarter, the southwest quarter of the southeast quarter, and the southeast quarter of the southwest quarter, all in section thirteen in township ten north, range one east, and also any and all other lands and real estate in the counties of Gratiot, Saginaw, Bay, Mid'and, Isabella, or either of them, in the State of Michigan, or in any other town or county in said State of Michigan.

2d. Deed of Cyrus F. Jackson and wife, by Amos Gould, attorney, dated June 21, 1869, to Morris Osborn, his heirs and assigns, of twelve hundred and eighty acres of the land in question, for the sum of nineteen hundred and twenty (1920) dollars.

3. Deed of Cyrus F. Jackson and wife, by Amos Gould, attorney, dated June 26, 1869, to Van Deusen and Smith, their heirs and assigns, of one hundred and twenty acres of the land in question, for the sum
52 of twelve hundred (1200) dollars.

4. Deed of Cyrus F. Jackson and wife, by Amos Gould, attorney, dated June 30, 1869, to Morris Osborn, of four hundred acres of the land in question, for the sum of four hundred dollars.

5. Deed of Cyrus F. Jackson and wife, by Amos Gould, attorney, dated July 2, 1869, to Morris Osborn, of three thousand eight hundred and forty three (3,843) acres of the land in question, for the sum of four thousand eight hundred and seventy-five dollars.

6. Deed of Cyrus F. Jackson and wife, by Amos Gould, attorney, dated July 1, 1869, to Morris Osborn, of one hundred acres of the land in question, for the sum of one hundred (100) dollars.

Said deeds made by said Gould embraced all the lands in question in this suit.

And the said plaintiff, to further maintain the issue on his part, offered in evidence the deposition of James L. Anthony, who was one of the witnesses to the deed executed by Cyrus F. Jackson and wife to An-
53 na D. Anthony, bearing date June 23d, 1865, and which deed was first recorded in May, 1871, for the purpose of showing that it was in fact executed at the time it purported to have been executed and was then delivered, and that it was for some time mislaid and supposed to be lost, and to explain the circumstances of the loss of the deed and the delay in recording it, and which deposition tended to show the facts for which it was offered; and thereupon said defendant objected to the admission of said deposition as incompetent, but the court overruled said objection and admitted said deposition in evidence; to which said defendant then and there duly excepted.

The defendant, by his counsel, then objected to the admission in evidence of so much of the fifth interrogatory contained in said deposition and the answer thereto as relates to the contents of said deed by giving a description of the land and before what officer acknowledged and whether the deed is in possession of the witness, as incompetent. Said interrogatory and answer thus objected to are as follows:

54 "5th. Do you remember of a deed being executed by Cyrus F. Jackson and Jerusha K., his wife, to Anna D. Anthony in the year 1865? and, if so, state what was the date of the deed and give a description of the lands embraced in it, and state whether or not you saw the deed executed by the grantors, and, if so, before what officer, and also state whether you have that deed in your possession.

Ans. "I remember that there was such a deed executed in June of that year by Cyrus F. Jackson and his wife to Anna D. Anthony; it was dated June 23d, 1865. I saw the deed executed by both parties, and I thereupon became a witness to the execution of the deed. The deed was executed before J. Henry Hill, a commissioner of Michigan in Massachusetts, residing at Worcester, who thereupon affixed his certificate of the acknowledgment of the same. The property conveyed by said deed consisted of between seven and eight hundred acres of land situated in Michigan; a copy of the description of said land is embraced in a copy of said deed, which I now have in my possession and which
55 is now before me, and which I now produce, marked "Exhibit A," by the commissioner, (and is annexed to the deposition.) I have not got the original in my possession. I delivered it to Henry Day, to be recorded in Michigan, during the first part of April, 1871." The plaintiff, by his counsel, thereupon stated that he would not ask to read the whole of said answer in evidence, but only the following portion thereof, namely:

"I remember that there was a deed executed by Cyrus F. Jackson and wife to Anna D. Anthony. It was dated June 23, 1865. I saw the deed executed by both parties, and I thereupon became a witness to the execution of the deed. It was executed before J. Henry Hill, a commissioner for Michigan, residing at Worcester." Whereupon counsel for defendant still objected to the admission in evidence of so much of said answer as is above set forth, as incompetent, and the said district judge did then and there render his opinion and decision overruling said objection and admitting the above portion, not to prove the contents of the deed, but only for the purpose of identification; to
56 which opinion and decision the said defendant, by his counsel, did then and there duly except.

The said defendant, by his counsel, then objected to the admission in evidence of the eleventh interrogatory and the answer thereto, as incompetent. Said interrogatory and answer are as follows:

"11. Look at the deed marked "Exhibit B," made by Anna D. Anthony and Charles J. Anthony, and state who made the negotiations between Mrs. Anthony and Mr. Day with regard to the sale of the property.

"Ans. I did; I made them all. The parties did not meet themselves."

But the court overruled said objection and admitted said interrogatory and answer in evidence to; which said defendant then and there duly excepted.

The said defendant, by his counsel, further objected to the admission in evidence of the twelfth interrogatory and answer thereto, contained in said deposition, as incompetent. Said interrogatory and answer are as follows:

"12. State what was the true consideration by the grantors in
57 that deed of which Exhibit C is a copy?

"Ans. Mr. Day and Mr. C. J. Anthony were interested together in large operations. Mr. Day had an account against Mr. Anthony of some thirty-eight thousand dollars, arising out of operation-

in different companies. Mr. Day desired to have this settled, and agreed to take the conveyance of the land mentioned in Exhibit C in full discharge of the same. Mrs. Anthony and her husband accepted said offer, and executed the said deed of which Exhibit C is a copy, in full discharge of all Mr. Day's claims against the said C. J. Anthony. I received the deed from Mr. Anthony and delivered the same to Mr. Day, who accepted it in full discharge of all claims."

But the court overruled said objection and admitted said interrogatory and answer in evidence; to which the said defendant, by his counsel, did then and there duly except.

The plaintiff, to further maintain said issue on his part, called as a witness Alexander W. Heather, and gave evidence tending to
58 show that he had long been engaged in the business of examining pine-timber lands and making estimates of the quantity of pine timber thereon, and of the value of such lands, in the region where the lands in question were situated; that he examined certain of the lands in question in 1861, and gave evidence tending to show that he found the timber had been cut off subsequent to the time that defendant sold the same; and thereupon the plaintiff's counsel asked said witness the following question:

"From the stumps, could you form a judgment of the timber that had been there?" To which question the defendant, by his counsel, objected as incompetent; but the court overruled said objection and permitted said question to be asked of said witness, and the same was answered by said witness as follows: "I judge from what stumps I saw that there had been about 15,000,000 feet cut off the lands altogether."

To which opinion and decision of said court said defendant, by
59 his counsel, did then and there duly except.

And thereupon, after giving certain other testimony, including conveyances bringing the title of the lands in question from the United States down to Charles J. Anthony prior to the said conveyance to his wife, the plaintiff rested his case.

And the said defendant to maintain said issue on his part gave evidence tending to show that at the time when the said defendant conveyed the lands in question, under the power of attorney from said Cyrus F. Jackson, said defendant had no knowledge or information whatever that said lands had been conveyed by said Cyrus F. Jackson to Anna D. Anthony. Said defendant among other testimony offered in evidence the following deeds, and the same were admitted in evidence without objection:

1st. A certified copy from the register's office of a warranty deed from Charles J. Anthony and wife to Mary G. Rodgers, dated April
60 10, 1862, and executed and acknowledged on said last-named day, which deed conveys to Mary G. Rodgers section 13 in town. 12 north, of range 1 west, containing 640 acres; said land being part of the lands conveyed by said defendant under his power of attorney from said Jackson.

2d. A certified copy from the office of the registers of deeds of Midland County, of a conveyance made by the auditor-general of the State of Michigan, to Henry Day the plaintiff, of the east half of section 15 and the west half of section 15, containing 640 acres, and the southwest quarter of the southwest quarter of section one, (1,) containing 40 acres, all in town. 18 north, of range 2 east, said conveyance having been made upon a sale of said described parcels of land for the taxes of 1866, under and by virtue of the laws of the State of Michigan, and bid off at said sale by the State and recorded in the register's office of Midland Co.

Said deed bears date February 18, 1869, and a copy of which is as follows:

"This indenture, made the eleventh day of February, one thousand eight hundred and sixty-nine, between Wm. Humphrey, auditor-
61 general of the State of Michigan, of the first part, to Henry Day, of the second part, witnesseth that whereas, in pursuance of the provisions of law, the said party of the second part on the 9th day of May, A. D. 1868, became the purchaser of the rights of the State in and to the following-described lands, situate in the county of Midland, in said State, which were bid off to the State for the taxes assessed thereon in the year 1866, to wit, (E. ½) east half of section fifteen and west half of section fifteen, each containing 320 acres more or less, and southwest quarter of southwest quarter of sec. one, containing forty acres more or less, all in town. eighteen north of range two east; and whereas said party of the second part obtained his certificate from the auditor-general for the purchase of the above-described lands according to law, and paid to the State treasurer upon such certificate the sum of sixty-two dollars and ten cents, being the amount of purchase money
62 thereof as provided by law, which certificates have been presented and surrendered to the said auditor-general: Now, therefore, this indenture witness that the said William Humphrey, auditor-general of the State of Michigan, in the name of the people of said State and by virtue of the authority vested in him by the laws thereof, in consideration of the premises and the payment of the purchase-money above mentioned, the receipt whereof is hereby confessed and acknowledged, does by these presents remise, release, and quitclaim unto the said Henry Day, party of the second part, and to his heirs and assigns forever, all the rights acquired by the State in virtue of the original sale or sales to the State in the premises above described, subject to all taxes duly assessed thereon.

"In testimony whereof the said Wm. Humphrey, auditor-general as aforesaid, has hereunto set his hand and seal the day and year first above written.

"WM. HUMPHREY, [L. S.]
"*Auditor-General of the State of Michigan.*

"Signed, sealed, & delivered in presence of—
"ROBERT MCDOUGALL.
"F. R. READE.

63 "STATE OF MICHIGAN,
"*County of Ingham, ss.*

"On this 11th day of February, A. D. 1869, before me, a notary public in and for said county, personally came the above-named William Humphrey, auditor-general of said State, known to me to be the person who executed the foregoing instrument, and acknowledged the same to be his free act and deed.

"DANIEL READE,
"*Notary Public, Ingham Co., Mich.*"

And the next six deeds mentioned are in the same form, differing from the above only in the matter of the description of the lands.

3d. A duly certified copy from the register of deeds of Iosco County of a conveyance made by the auditor-general of the State of Michigan to Henry Day, the plaintiff, of the south half of the northeast quarter

and the north half of the southeast quarter of section 22 in town. 21 north of range 7 east, containing 80 acres; said conveyance having been made upon a sale of said described parcel of land for the taxes assessed thereon for the year 1866, under the laws of the State of Michigan, said deed bearing date of execution and acknowledgment of February 11, 1869.

4th. A duly certified copy from the register of deeds of Iosco County, Michigan, of a conveyance dated and acknowledged February 11th, 1869, made by the auditor-general of the State of Michigan to the said plaintiff, of the south half of the northeast quarter, and the north half of the southeast quarter of section 22, in town. 21 north, of range 7 east, containing in all 160 acres of land, said conveyance having been made upon a sale of said described parcels of land for the taxes assessed thereon for the year 1865, under the laws of the State of Michigan; said deed was recorded in said Iosco County, March 11th, 1869.

6th. A duly certified copy, made by the register of Midland County, of a conveyance recorded in the office of the register of deeds of said county, dated February 11, 1869, and executed and acknowledged the same day by the auditor-general of the State of Michigan, to the said plaintiff of the following-described lands, namely: the northeast quarter of the southwest quarter, containing 80 acres; the northeast quarter and the west half of the northwest quarter, and the northeast quarter of the northwest quarter, containing 280 acres, all in section one, (1,) also entire of section fifteen, (15,) and entire of section seventeen, (17,) each containing 640 acres, all in town. two (2) north, of range two (2) west, said conveyance having been made upon a sale of the interest of the State of Michigan in said described lands, which had been previously bid off by the State of Michigan, at a sale thereof, for taxes assessed thereon for the year 1866, said assessment and said sale having been made under and by virtue of the laws of the State of Michigan.

7th. A duly certified copy, made by the register of deeds of Midland County, of a conveyance recorded in the office of the register of deeds of said county, dated February 11th, A. D. 1869, and executed and acknowledged the same day by the auditor-general of the State of Michigan, to the said plaintiff of the following-described lands, namely: the west half of the northwest quarter, and the east half of the northeast quarter, each containing 80 acres, and the northeast quarter of the southeast quarter, and the southeast quarter of the northwest quarter, each containing 40 acres, and the southwest quarter, containing 168 acres, all of section seventeen, (17,) in townseventeen (17) north, of range two (2) east, said conveyance having been made on a sale of said described lands for taxes assessed thereon for the year 1866, under and by virtue of the laws of the State of Michigan.

8. A duly-certified copy made by the register of deeds of the county of Midland of a conveyance of record in the office of the register of deeds of said county, dated February 11, 1869, and executed and acknowledged the same day, by the auditor-general of the State of Michigan, to the said plaintiff, of the interest of the State of Michigan in the following-described lands, namely: The northeast fractional quarter, containing 99 & 47-100 acres, & the south half of the southeast quarter, both in section one, (1,) and the east half of the northeast quarter and west half of the northwest quarter, and the east half of the southeast quarter, each containing 80 acres; also, the northeast quarter of the northwest quarter, and the northwest quarter of the southeast quarter, each containing 40 acres, all in section eleven, (11,) and all of said land in town.

18 north, of range one (1) east; said conveyance having been
68 made upon the sale of the interest of the State of Michigan in said lands, which had been previously bid off by the State of Michigan upon the sale thereof for the unpaid taxes assessed thereon for the year 1866, said assessment and sale having been made under and by virtue of the laws of the State of Michigan.

9. A duly-certified copy made by the register of deeds of the county of Gratiot of a conveyance of record in the office of the register of deeds of said county, dated February 11, 1869, and executed and acknowledged the same day by the auditor-general of the State of Michigan to the said plaintiff of the interest of the State of Michigan in the following-described lands, namely: Entire of section 13 in town. 12 north, of range 1 west, said conveyance having been made upon the sale of the interest of the State of Michigan in said land, which had been previously bid off by the State of Michigan upon the sale thereof for the unpaid taxes assessed thereon for the year 1866; said assessment and sale having been made under and by virtue of the laws of the State of Michigan.

69 All of the lands described in the several conveyances above set forth are part of the lands conveyed by said defendant under the power of attorney given to him by said Cyrus F. Jackson.

And the said defendant thereupon offered in evidence a transcript of a judgment-record of the circuit court for the county of Gratiot, in the State of Michigan, in a certain cause wherein Alfred L. Williams was plaintiff and Anna D. Anthony was defendant, which suit was commenced on the 22d day of May, 1871, by the issuing of a writ of attachment, by virtue of which the land described in the plaintiff's declaration in this cause were attached, and tending to show that such proceedings were had in said cause that judgment was obtained therein against Anna D. Anthony on the 18th day of October, 1871, and that upon such judgment execution was issued, and by virtue of said execution said lands were levied on and sold; but to the admission thereof in evidence the plaintiff objected, which objection was sustained by the court,

70 and the defendant then and there excepted.

And the said defendant, to further maintain the issue on his part, offered in evidence the deposition of Alfred L. Williams, taken upon interrogatories, and thereupon the said plaintiff objected to the admission in evidence of the third interrogatory and answer thereto contained in said deposition as incompetent. Said third interrogatory and answer are in the following words:

"Third. Are the said Charles J. Anthony and Anna D. Anthony, or either of them, indebted to you? If so, state how much they are each of them indebted, and when the same accrued, what proceedings you have taken in the courts to enforce the payment of each, and where were such proceedings had, if any?

"Ans. The said Charles J. Anthony, at the time of his death, was indebted to me in the amount of forty-two thousand nine hundred and ninety-five dollars, and interest from the 7th of March, 1868, no part of which has ever been paid. The said Anna D. Anthony is indebted to

71 me in the sum of fifteen thousand two hundred and forty-eight dollars and eighty-nine cents, besides interest from the 7th of March, 1868; that said indebtedness accrued previous to the year 1867. For the recovery of each of the said demands I commenced suit in the supreme court of the State of New York, in the city and county of New York, by the usual complaint, which was sworn to in each case, on the 21st day of September, 1867; the usual summons for the appearance of the defendant in each case was issued to the sheriff of said county to be

served on them respectively. The summons in each case was returned by the sheriff that the defendants could not be found, althoug' both of them were residents of the city of New York. Upon showing the above facts to the court an order was made that the service on each of the defendants be made by publication according to the rules & practice of said court. That said publication was made in the New York World as required by law, and such proceedings were had in said court
72 that on the seventh day of March, 1868, I recovered judgment in said suit against Anna D. Anthony for fifteen thousand two hundred and two dollars and twenty cents damages, and forty-six dollars and sixty-nine cents costs; and execution was issued on said judgment to said sheriff and returned by him wholly unsatisfied for want of property; and such proceedings were had in said court in the case against Charles J. Anthony that on the seventh of March, 1868, I recovered against him a judgment for forty-two thousand nine hundred and ninety-five dollars and ninety-nine cents, and execution was issued to said sheriff upon said judgment and returned by him wholly unsatisfied for want of property upon which to levy."

And the said district judge did thereupon render his opinion and decision sustaining the objection of said plaintiff to the admission of said interrogatory and answer in evidence; and the same were excluded; to which opinion and decision the said defendant, by his counsel, did then and there duly except. And thereupon the plaintiff by his coun-
73 sel further objected to the admission in evidence of the seventh and eighth interrogatories and the answers thereto contained in the said depositions of Alfred L. Williams as immaterial and incompetent. Said several interrogatories and answers are as follows:

"Seventh. Previous to and about the time you commenced proceedings to enforce a payment of the indebtedness due from said Anthonys to you, did you have any conversation with the plaintiff in regard to said indebtedness, and his assisting you in enforcing the payment thereof? If yea, state said conversations fully in the order in which they occurred with reference to said proceedings.

"Ans. In the month of October, 1866, I met the said Henry Day in Detroit, and had business with him in relation to the sale of the Amboy, Lansing and Traverse Bay Railroad to the Lansing & Saginaw Railroad Company, he, the said Day, holding a large amount of bonds of the said first-mentioned company which were to be provided for in said
74 sale. At said interview the said Henry Day and myself had conversation in relation to my claim above referred to against the Anthonys. He, the said Day, related to me that he had got his matters with them, the said Anthonys, all settled up and paid, and asked me if they were not owing me something. I stated to him they were, and I also stated to him the amounts, and stated it nearly as I have stated it here. I also stated to him that as soon as I got through and closed up the sale of the said railroad I was going to New York to attend to collecting the amounts due me from said Anthonys. Henry Day replied, and said to me, 'They ought to pay you, and when you come to New York come to me, and I will help you collect it.' Afterwards, on the occasion of the sale of the Amboy, Lansing and Traverse Bay Railroad to the Jackson, Lansing and Saginaw Railroad Company in the latter part of January, 1867, I again met the said Henry Day at Lansing, he being also interested in said sale. At this time we again conversed about my claim against the said Anthonys. I told him as soon as I got the
75 matter of this sale settled up I intended to go to New York and give attention to my said claim against the said Anthonys, and I

proposed to Mr. Day to retain him and his partners as my counsel in the collection of the claims, and pay them for their services. Mr. Day declined to be retained, but said he could do me more good by acting outside, and not ostensibly as my counsel, but when I went down to New York to call on him and he would help me, remarking that I might have to commence suit, which would probably result in their compromising with me, as they had done in nearly all such cases. He also intimated to me that there were some western lands they could control, or that might be reached in law.

"About the first of May, 1867, I went to New York for the purpose of collecting said claims. I called on Mr. Day, pursuant to agreement, and stated to him that I had come for the purpose of trying to collect those claims. The said Day said to me, 'You had better sue them,' referring to the Anthonys, 'and when you do they will probably call on
76 me in reference to it, and I will then see what I can do for you.'

"I then spent some days in New York, endeavoring to find Charles J. Anthony and his wife, in order that I might negotiate with them and try and settle up the claims. I could not get an interview with them, although I was told that they were in the city, yet they kept concealed or out of the way, so that I could not find either of them.

"Some time in the month of June, 1867, I left New York and went South, to Washington and North Carolina, and was absent, as near as I can remember, until the month of August following. Soon after my return I got an interview with James L. Anthony, son of said Charles J. Anthony and wife, and had a conversation with him in relation to said claims against his father and mother. I asked him to aid me in getting a personal interview with his father and mother and in settling up said claims. He at first declined to do anything about it, but finally said to me, 'It is not best that you should see them, but I would
77 suggest that you write a letter in regard to the claims and give it to me. I will give it to my mother, and she will show it to my father and talk with him about it, and we will see if we can have them settled.'

"In pursuance of that arraugment, on the thirteenth day of August, 1867, I addressed a letter to James L. Anthony and sent out to him, a copy of which I have and present to the officer taking my deposition, to be annexed thereto. It is marked 'Exhibit A.' After this I commenced suits to recover said claims as hereinbefore stated. Soon after I had commenced them I called upon the said Henry Day and informed him of the fact and asked him to help me as he had agreed to. The said Henry Day in reply said he did not think anything could be done and declined to have anything to do with it."

"Eighth. If you have any information not called for in the foregoing interrogatiories of said plaintiff's knowledge that the said Anthonys were the owners of said lands, the title thereof being held by other parties for the purpose of hindering, delaying, and defrauding
78 their creditors, state the same fully, and state also whether whilst you were in New York in 1867, or at any other time, you took any measures to ascertain whether the above-mentioned lands were in condition to be attached or levied upon and made applicable to the payment of your said claim. If yea, state what measures were taken by you.

"Answer. Cyrus F. Jackson, who is said to have held the title to these lands, is a brother-in-law to Charles J. Anthony, and, as I understood, was one of the persons who held the property of said Anthonys to defraud their creditors. For the last twenty-five or thirty years the said Amos Gould has been my standing attorney and counsel at Owosso in relation

to all my matters in the State of Michigan. Before I went to New York in the spring of 1867, I explained to him fully the nature of my claim against the Anthonys and the object of my contemplated visit to New York, and counseled with him as to how I should proceed. Whilst
79 in New York looking after the matter I wrote said defendant, Amos Gould, frequently in regard to my progress in the matter, and at one time asked him if he knew where the title was to the said lands which were so sold by the Amboy, Lansing and Traverse Bay Railroad Company to said Charles J. Anthony. I received from him a reply in substance that he did not know but would make enquiry, and if possible ascertain and let me know. Afterwards I learned from him that he had found where the title was to the land in the schedule annexed to these interrogatories, and what he had done with them."

And the said district judge did thereupon render his opinion and decision sustaining the objections of said plaintiff to the admission in evidence of said seventh and eighth interrogatories and said answers thereto, and the same were excluded, to which opinion and decision the said defendant by his counsel did then and there duly except.

80 And the said defendant to further maintain said issue on his part offered in evidence the certified copy of the proceedings in chancery of the circuit court of Saginaw County *in chancery* in a certain cause wherein the present plaintiff, Henry Day, is complainant, and the defendants are the defendant in this suit and the several grantees of Cyrus F. Jackson, under his power of attorney to the defendant in this suit, which power of attorney has been before described in this suit, in which proceedings the complainant in his bill avers that said grantees were not purchasers in good faith, and the object of said suit being to set aside these conveyances and recover the lands therein described, by which record it appeared that the proceedings in said cause had not been carried beyond the pleadings; and thereupon the said plaintiff by his counsel objected to the admission of said copy of said chancery proceedings in evidence as immaterial and incompetent, which objection was sustained by the court and said evidence excluded; to which the defendant by his counsel duly excepted.

81 The counsel for the defendant, for the purpose of contradicting a statement made by the plaintiff in his evidence, to the effect that if he ever told said deponent Williams that his claim against Charles J. Anthony was paid, it only related to the business between them in the matter of the Amboy, Lansing and Traverse Bay Railroad Company, was allowed to read the following portion of the answer of said Williams to the seventh interrogatory, as follows:

"In the month of October or November, 1866, I met the said Henry Day in Detroit." "At said interview said Henry Day and myself had a conversation in relation to my claims above referred to against the Anthonys. He, the said Henry Day, stated to me that he had got his matters with them, the said Anthonys, all settled up, and asked me if they were not owing me something."

The counsel for the defendant then, for the same purpose, offered to read in evidence so much of the residue of said answer to said seventh interrogatory as related to the interview between the plaintiff and said Williams, to which the plaintiff objected, and the court sustained
82 said objection and excluded the same, and the defendant excepted thereto. The portion of the answer to said interrogatory thus excluded is as follows:

"I also said to him as soon as I got through and closed up the sale of the said railroad, I was going to New York to attend to collecting the

amounts due me from the said Anthonys. Henry Day replied and said to me, 'They ought to pay you, and when you come to New York come to me, and I will help you collect it.' Afterwards, on the occasion of the sale of the Amboy, Lansing and Traverse Bay Railroad to the Jackson, Lansing and Saginaw Railroad Company in the latter part of January, 1867, I again met the said Henry Day at Lansing, he being also interested in said sale. At this time we again conversed about my claims against the said Anthonys, and I proposed to Mr. Day to retain him and his partner as my counsel in the collection of the claims, and pay them for their services. Mr. Day declined to be retained, but said he could do me more good by acting outside and not ostensibly as my counsel,
83 but when I went down to New York to call on him and he would help me, remarking that I might have to commence suit which would probably result in their compromising with me as they had done in nearly all such cases. He also intimated to me that there were some western lands they could control or that might be reached in law.

"About the first of May, 1867, I went to New York for the purpose of collecting said claims. I called on Mr. Day pursuant to agreement, and stated to him that I had come for the purpose of trying to collect those claims. The said Day said to me, 'You had better sue them,' referring to the Anthonys. 'And when you do so they will probably call on me in reference to it, and I will then see what I can do for you.'"

And thereupon, after giving other testimony, the defendant rested his case.

The foregoing bill contains all the testimony which tends to show that the title of the lands in question was in the plaintiff. No question being made on any of the conveyances except those herein specifically mentioned.

And the court being about to give the charge to the jury, the
84 said defendant thereupon requested the court to give the following specific charges to said jury:

1st. To enable the plaintiff to recover in this case he must prove that at the time when the defendant, as attorney for Jackson, conveyed the lands described in the declaration he was the owner in fee of said lands under and by virtue of an unrecorded deed of said Jackson to Anna D. Anthony.

2d. The evidence in this case does not tend to prove such title in fee.

3d. The tax-titles put in evidence are prima facie evidence that the title to the lands therein described was in the plaintiff by virtue of such tax-deeds at the time when said defendant, as attorney for Jackson, attempted to convey the same, and therefore as to such lands the plaintiff cannot recover against the defendant, as he has not been injured by such attempted conveyance by defendant as attorney for said Jackson.

4th. That as to so much of the lands described in said declaration as were conveyed by C. J. Anthony to other persons, prior to the
85 date of the deed of said Anthony to Jackson, there can be no recovery, as the titles to such lands never vested in the plaintiff.

5th. As to so much of said lands as were conveyed to the plaintiff previous to the attempted conveyance of defendant as attorney for Jackson the plaintiff cannot recover, as at the time of said attempted conveyance he had parted with his title thereto.

6th. If the jury find the deed from Anthony to Jackson put in evidence by plaintiff was made and recorded without the knowledge of said Jackson and never delivered to him, then no title to the land described therein passed to said Jackson, and the plaintiff obtained no title thereto by virtue of his deed thereof from Anna Anthony,

7th. The power of attorney executed by said Jackson to the defendant

to convey the lands therein generally described did not of itself operate as a delivery of the deed from Anthony to Jackson, nor did it make such deed an effective instrument.

8. If at the time defendant, as attorney for Jackson, conveyed the lands in question he had no knowledge or belief that the plaintiff
86 had a conveyance thereof, or any valid claim or title thereto, then the plaintiff cannot recover, and the burden of proof is upon the plaintiff to show such knowledge or belief.

9. If at the time that defendant conveyed these lands, as the attorney of Jackson, he fully believed that the legal title thereto was in Jackson, then the plaintiff cannot recover.

10. If the land described in the plaintiff's declaration was conveyed by Mr. and Mrs. Anthony to the plaintiff without consideration, then he is not a bona-fide purchaser, and he cannot recover for the land previously conveyed by Mr. and Mrs. Anthony to Mrs. Rodgers.

11. The burden of proof is upon the plaintiff to show the number of acres in the southeast fractional quarter of section one (1) in township eighteen (18) north of range one (1) east, and the jury are not at liberty to presume that it contained one hundred and sixty acres or any given number of acres.

And the said district judge did then and there charge the said jury in accordance with said fourth, fifth, eighth, ninth, tenth, and
87 eleventh requests, but refused to charge said jury in accordance with said first, second, third, sixth, and seventh requests, and each of them; to which refusals to charge, and each of them, the said defendant, by his counsel, did then and there duly except.

In relation to the subject of the title to the lands referred to in the first and second requests of defendant the court charged the jury that in order to entitle the plaintiff to recover he must show title to the lands in himself at the time Gould sold them as attorney for Jackson, and the court charged, as requested by the plaintiff, that at the time of the conveyance of the lands by the defendant the plaintiff was the legal owner in fee of the lands in question, except those in town. 10 N., range one east, and the following in 21 N., R. 7 E., namely, northwest quarter of southwest quarter of section 14, and southeast quarter of northeast quarter and north half of southeast quarter of sec. 15; and also of the land conveyed to Mrs. Rodgers. To which charge defendant then and there excepted.

In relation to the effect of the non-delivery of the deed to Jack-
88 son the court charged as follows:

"I am requested to charge you, in addition to that, that if you shall find that Jackson acted upon the deed thus made to him by deeding the lands afterwards to Mrs Anthony, that then the delivery was of no consequence, he thereby affirmed the conveyance to himself and he cannot question it, neither can Gould, the attorney under him. This is correct law, and I so charge you. I charge you also, in addition to that, that in his acting upon the title by assuming to convey the same, or rather to authorize the conveyance of the same by a power of attorney to Gould, is also a ratification of it, and the want of delivery is of no importance in this case. The title is as perfect as if the delivery had been made in the commencement." To which charge the defendant then and there excepted.

And the court, under the charge and with the direction aforesaid and other appropriate directions, left the aforesaid issue and the evi-
89, 90 dence so given on the trial thereof to the said jury, and the jury

aforesaid then and there gave their verdict for the said plaintiff and assessed his damages at the sum of dollars.

And inasmuch as the said matters so produced and given in evidence on the part of said defendant, and by his counsel insisted on as aforesaid, do not appear by the record of said trial and verdict, the counsel for the defendant did then and there propose the aforesaid exceptions to the opinions, decisions, and charges of said district judge, and request him to sign this bill of exceptions, containing the several matters aforesaid, pursuant to the statute in such case made and provided; and thereupon the said district judge, at the request of the counsel for said defendant, hath signed this bill of exceptions, pursuant to the statute aforesaid, on this tenth day of October, A. D. 1874.

JNO. W. LONGYEAR,
District Judge.

91 *Copy bond.*

Know all men by these presents that Amos Gould, of Owosso, Michigan, as principal, and Thomas D. Dewey and Edwin A. Todd are held and firmly bound unto Henry Day in the sum of fifty thousand dollars, lawful money of the United States of America, to be paid to the said Henry Day, or to his certain attorney, heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind our heirs, executors, and administrators, and each and every of them, firmly by these presents, sealed with our seals, dated the 23d day of July, one thousand eight hundred and seventy-four.

The condition of this obligation is such that whereas on the 29th day of June, A. D. 1874, in a cause tried in the circuit court of the United States for the eastern district of Michigan, between Henry Day, as plaintiff, and the above-bounden Amos Gould as defendant, a judgment was rendered in favor of said Henry Day and against said Amos Gould for the sum of thirty-three thousand twenty $\frac{65}{100}$ dollars damages, besides costs of the suit; and whereas said Amos Gould, conceiving himself aggrieved by said judgment, brings his writ of error thereon to the Supreme Court of the United States:

Now, therefore, if the above-bounden Amos Gould shall prosecute his said writ to effect and answer all damages and costs which
92 may be awarded against him on account thereof, then this obligation to be null and void.

(Sig'd)	A. GOULD.	[L. S.]
(")	T. D. DEWEY.	[L. S.]
(")	E. A. TODD.	[L. S.]

In presence of—
(Sig'd) JEROME W. TURNER.

Approved.
(Sig'd) JNO. W. LONGYEAR,
District Judge.

The circuit court of the United States for the eastern district of Michigan.

HENRY DAY
vs.
AMOS GOULD.

UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

On this 24th day of July, A. D. 1874, personally appeared before me, the undersigned, a commissioner for said district, Thomas D. Dewey & Edwin A. Todd, both of the city of Owosso, Michigan, and the same persons who executed the bond of the defendant in the above-entitled cause, and being by me duly sworn, on their several oaths depose
93, 94 and say that they are each worth the sum of fifty thousand dollars over and above all exemptions and legal claims against them, and liens upon their property, and that they are each worth the said sum in property liable to execution.

(Sig'd) E. A. TODD.
(") T. D. DEWEY.

Subscribed and sworn to before me this 24th day of July, 1874, and I certify that said deponents justified before me their responsibility as sureties on said bond on oath.

(Sig'd) JEROME W. TURNER,
U. S. Commissioner in & for 7th Judicial Circuit & Eastern Dist. of Mich.

(Endorsed:) Filed in clerk's office, July 27, 1874. A. Mandell, clerk.

95 · EASTERN DISTRICT OF MICHIGAN, *ss:*

I, Addison Mandell, clerk of the circuit court of the United States for the eastern district of Michigan, do hereby certify the above and foregoing to be the original writ of error and citation, and a true copy of the original record of judgment in the case of Henry Day against Amos Gould, in said court, the same having been carefully compared by me with such original, and is a correct therefrom, and of the whole thereof; also the original bill of exceptions filed in said cause, and also a copy of the bond on writ of error, filed in said cause.

In testimony whereof I have hereto set my hand officially and affixed the seal of said court at Detroit this fourteenth day of October, A. D. 1874.

[SEAL.] ADDISON MANDELL, *Clerk.*

Clerk's fees, $30. A. Mandell, clk.

(Indorsement on cover:) No. 196. Amos Gould, plaintiff in error, vs. Henry Day. E. Michigan C. C. U. S. Filed 19th October, 1874.

BRIEF FOR PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

AMOS GOULD, PLAINTIFF IN ERROR,

vs.

HENRY DAY, DEFENDANT IN ERROR.

C. I. WALKER, of Counsel.

SUPREME COURT of the UNITED STATES.

AMOS GOULD,
Plaintiff in Error,
vs.
HENRY DAY,
Defendant in Error.

BRIEF OF C. I. WALKER,

For Plaintiff in Error.

This action of the case, brought by the defendant in error against the plaintiff in error, charging that in the year 1869 the plaintiff below was the owner of certain lands situated in the State of Michigan, through a deed from one Cyrus F. Jackson and wife to Mrs. Anna D. Anthony; which deed to Mrs. Anthony was not upon record, and therefore the title of record appeared to be in said Cyrus F. Jackson. That the defendant, knowing the premises, and desiring to defraud the plaintiff, procured said Jackson and wife to execute to him a power of attorney to sell and convey said lands; and that under and by virtue of said power he did convey the lands set out in the declaration to various persons who were purchasers, for a valuable consideration, and without notice of the rights of the plaintiff; and that the deeds to said purchasers were recorded before the deed from said Jackson to Mrs. Anthony was put upon record.

Record, p. 6 and 8.

The plea was the general issue; and on the trial the jury found a verdict for the plaintiff for the sum of $33,020.65.

Record, p. 9.

Facts.

For perspicuity and brevity the parties will be spoken of as they stood below—Day as plaintiff, and Gould as defendant.

The facts, either stated or indicated by the record, are as follows:

The parties are both attorneys, the plaintiff residing in New York, and the defendant in Owosso, Michigan.

In the year 1861, the plaintiff, Day, one Charles J. Anthony, and one Jonathan Edwards, of New York, were engaged in the State of Michigan in the construction of the Amboy, Lansing and Travers Bay Railroad Company, and various lands were received by them in connection with the said construction.

See Correspondence, Record, p. 12–14.

Cyrus F. Jackson was employed in locating these lands for these parties, which work was finished in the fall of 1861; and he had an unpaid demand for his services of several hundred dollars; and they got hold of a receipt in full of Jackson's, and wrongfully kept the same without paying his bill.

See Jackson's Letters, p. 12–14.

Anthony became largely indebted to Day, the plaintiff, and also to one Alfred L. Williams, of Owosso, in the State of Michigan, who was a client of the defendant Gould, and had been for many years. Mrs. Anna D. Anthony, wife of said Charles J. Anthony, was also largely indebted to Williams.

Record, 23–24.

On the first of April, 1865, Anthony and his wife executed a deed of the lands in question to the said Cyrus F. Jackson, who was a brother-in-law of Anthony, without any knowledge of said Jackson whatever; nor was there ever any actual delivery of the deed.

Record, 10–11.

On the 23d of June following, Jackson conveyed these lands to Mrs. Anna D. Anthony, at the request of said Charles J. Anthony, and without any consideration therefor.

Record, 10.

This was the first that Jackson knew of this conveyance to himself.

Ib.

This deed was not put upon record until 1871, and, as defendant claims, the conveyances were in fraud of the creditors of Anthony, and especially of Williams, and the deed to Mrs. Anthony was kept from the record for the purpose of concealing the title and making it appear to be in Jackson.

In 1866 the plaintiff Day was made acquainted with the fact that the Anthony's were still indebted to the said Williams in a large sum, and that Williams proposed to take measures for its collection; and the plaintiff Day, who was an attorney, volunteered to aid him in this matter.

Record, 24, 25.

In May, 1867, and again in June and August of the same year, Williams was in New York, and called upon the plaintiff, Day, to aid him in the collection of his debt against the Anthonys, whom he could not find, and who were kept concealed; but Day declined to render any efficient aid.

Record, p. 25.

Day had stated to Williams in 1866 that he had settled up with the Anthonys, and had been paid; but on the second of September, 1867, and about the time that Williams was seeking, with the knowledge of Day, to get his pay from the Anthonys, the latter doubtless taking advantage of this very effort of Williams, obtained a deed of the lands in question from Mrs. Anna D. Anthony, the pretended consideration of which was an indebtedness from

Charles J. Anthony to him of a very large amount, some $38,000, which had already been paid according to his own admission.

Record, 19.

Williams was at this time in consultation with the defendant Gould, his attorney, in relation to his efforts to collect his debt of the Anthonys, and requested him to examine whether there were not railroad lands standing in the name of Anthony; and was subsequently informed by Gould that he had found where the title to the Anthony lands actually was.

Record, 25–26.

Williams soon after this—in March, 1868—obtained judgment against the Anthonys in New York—Against Anna D. Anthony for $15,202.20, and costs, and against Charles J. Anthony for $42,095.99, and costs; upon which execution was issued.

Record, p. 23–24.

In the early part of 1869, Jackson was in some way informed that the title to some property in Michigan still stood in his name, and wrote to a gentleman at Owosso, where the defendant, Gould, lived, to make inquirie in relation to the matter. This letter was put into the hands of the defendant, Gould, with the request that he should answer it. A correspondence then ensued between Gould and Jackson in relation to these lands, not altogether ingenuous on either side, but it is in no way material to the issue before this court.

Record, 12–18.

The defendant in this correspondence acted under the conviction that the lands in question really belonged to Anthony, and that they had been conveyed to Jackson in fraud of his client, Williams, and his effort was to get a portion of the proceeds thereof for his client.

Jackson, on his part, sought to avail himself of the title standing in his name to obtain payment from Anthony and others of his unpaid account, for which they had surreptitiously obtained his receipt in full.

The result was that Anthony executed a power of attorney to Gould to dispose of any lands which he held in certain counties in Michigan, including the lands in question; and that Gould, availing himself of this power, sold the lands to various persons, and transmitted to Jackson a sufficient sum to pay him for his unpaid claim against Anthony.

These deeds to the various purchasers were put upon record.

Record, p. 23.

The plaintiff, Day, filed a bill of complaint in the Circuit Court for the County of Saginaw, against the several purchasers under the power of attorney from Jackson, to set aside the deeds thus conveyed, upon the ground that they were not purchased in good faith.

Record, p. 26.

But subsequently, and on the 27th of December, 1870, the plaintiff commenced this suit in this Court.

Record, p. 2.

Questions raised on the trial.

During the process of the trial, a large number of exceptions were taken to the admissibility of testimony on the part of the plaintiff, many of which are waived, and upon which no assignment of errors is made. But there are two or three errors of this sort to which the attention of the Court is specifically directed.

One Alexander W. Heather was introduced upon the part of the plaintiff as a witness and as an expert in the business of examining pine timber lands, and making estimates of the quantity of timber thereon, and of the value of such lands in the region where these lands were situated. He testified to have examined certain of the lands in question in 1861, and gave evidence tending to show that he found the timber had been cut off subsequent to the time that defendant sold the same under the power of an attorney from Jackson. Witness was then asked this question:

"From the stumps, could you form a judgment of the timber that had been there?"

This question was objected to by the defendant as incompetent, but the objection was overruled, and the witness answered:

"I judge from what stumps I saw that there had been about 15 millions of feet cut off the lands altogether."

To this ruling of the Court exception was taken.

Record, p. 20.

We submit that this testimony was inadmissible for any purpose. The only pretence upon which it was admissible was as it tended to show the value of the lands; but it was entirely inadmissible, we submit, for this purpose, as it does not fix with precision the time when the timber had thus been cut from the lands—whether it was before or after the sale thereof under the power of attorney. If before, then clearly it was not admissible as tending to show the value of the lands when the same were sold; if long after, the same objection would lie, as the damages must be estimated at the time when the wrong was committed.

Then, too, this evidence clearly included all the timber cut from all the lands, and the value of this timber must have been an element taken into account by this jury, in the computation of the plaintiff's damages.

It appeared, however, by the testimony that part of these lands described in the declaration had been previously conveyed by the plaintiff to Mary G. Rodgers (Record, p. 20); and that as to those lands, the fact that timber had been cut thereon in no way rendered the defendant liable therefor.

II.

The deed of land from Charles L. Anthony and wife to Cyrus F. Jackson was never delivered to the grantee, and therefore conveyed no title.

It was thereupon improperly admitted in evidence.

Record, p. 12–27.
5th Assignment of error.
19th Assignment of error.

And the charge of the Court that it was made effective by the subsequent acts of Jackson in deeding to Anthony and in authorizing Gould to deed the lands was erroneous.

Record, p. 28.
22d Assignment of error.

The evidence of Jackson shows that the deed to him was never deliyered.

Record, p. 10.

It is entirely clear that the execution and recording of the deed was not tantamount to a delivery.

Younge v. Guilbeau, 3 Wallace, 636.
Parmalee v. Simpson, 5 Do., 86.
Maynard v. Maynard, 10 Mass., 456.
Hanks v. Pike, 105 Do., 560.

The only question that remains then, as to this, is whether making a deed of these lands to Mrs. Anna D. Anthony at the request of Charles L. Anthony was such an affirmance of the deed to Jackson as conveys any title whatever to the plaintiff, Day?

We submit that it cannot have such efiect. It was not intended as an affirmance of title or an acceptance of title, but rather as a renunciation of his having had any title whatever.

III.

But the principal errors relied upon for a reversal of the judgment in this case, and for the correction of which this writ of error was brought, relate to questions affecting the title of the plaintiff to the lands in question.

The gist of the plaintiff's action is that in 1869 he had a title to the lands described in the declaration, from Anna D. Anthony, through Cyrus F. Jackson; but that the deed from Jackson to Mrs. Anthony was not of record, and that the defendant, knowing or believing that the plaintiff had such title, obtained from Jackson a power of attorney by which he conveyed the lands in question to *bona fide* purchasers, and thus defeated the title of the plaintiff thereto, it not being complete of record.

Now, if at the time the defendant executed the deeds in question under the power of attorney from Jackson, Jackson not only had no title of record to a portion of these lands, but the plaintiff, Day, had previous thereto from other sources obtained a title to said lands, paramount to all other titles, then it is entirely clear that as to such lands he suffered no injury whatever by the conduct of the defendant, however wrongful that conduct was in purpose.

Defendant introduced in evidence several deeds from the Auditor General of the State of Michigan, executed on the 11th of February, 1869, by which a portion of the lands in question were conveyed to the plaintiff, Day.

Record, pp. 20-23.

This was previous to the attempt of the defendant to convey these lands under his power of Attorney from Jackson.

These deeds were what is known as tax-deeds, and purported to

be a conveyance of the lands under the provisions of law, they having been sold for the taxes of 1865 and 1866.

See Record, p. 31.

These deeds convey, among other lands, the following lands, which are described in the plaintiff's declaration, and for the loss of the title to which he claims and has recovered damages in this suit:

S ½ of N E ¼	Section	22	Town	21	N	Range	7 E.
N ½ of S E ¼	"	22	"	21	N	"	7 E.
E ½ of N E ¼	"	17	"	17	N	"	2 E.
W ½ of N W ¼	"	17	"	17	N	"	2 E.
S W ¼	"	17	"	17	N	"	2 E.
N E fractional ¼	"	1	"	18	N	"	1 E.
S ½ of S E ¼	"	1	"	18	N	"	1 E.
E ½ of N E ¼	"	11	"	18	N	"	1 E.
Entire of	"	13	"	18	N	"	2 E.

We insist that these deeds furnish evidence, and in the absence of any evidence to show them illegal, furnish conclusive evidence that the title to the lands described therein, vested in the plaintiff by virtue of said deeds, and that that title is paramount to all liens and incumbrances and other titles whatsoever.

If we are right in this, then the plaintiff's title to these lands does not rest upon the conveyance made by Cyrus Jackson to Mrs. Anna D Anthony, but upon these deeds from the Auditor-General of the State of Michigan, and that that title is in no way affected by the conveyances made by the defendant Gould, under his power of attorney from Jackson.

These deeds being in evidence, the defendant requested the court to charge:

First. That the plaintiff must prove a title to the lands in question, under and by virtue of the unrecorded deed of Jackson to Anna D. Anthony, described in his declaration.

Second. That the evidence did not tend to prove such title in fee.

Third. That the tax-titles are *prima facie* evidencr that the title to the lands therein described was in the plaintiff, by virtue of such tax-peeds, at the time when the defendant, as attorney for Jackson, attempted to convey the same, and therefore, as to such lands, the plaintiff cannot recover against the defendant, as he has not been injured by such attempted conveyance by defendant, as attorney for Jackson.

Record, p. 27.

Tne court refused so to charge, and the defendant excepted to each of said refusals.

We submit that it was manifest error to refuse these charges, and especially the third charge, as to the effect of the tax-title deeds.

In considering this question it becomes necessary to carefully examine the provisions of the statutes of Michigan in relation to the effect of tax-deeds. These statutes have the following provisions relating to the sale of land for unpaid taxes:

The lands are to be offered for sale, after due notice, by the several county treasurers, on the designated day.

1 Comp. L., p. 384, sec. 1050.

If sold, a certificate of sale is to be given to the purchaser.

Ib., p. 385, sec. 1056.

The owner of the land may redeem within a specified time.

Ib., p. 386, sec. 1059.

If not redeemed, the certificate is to be surrendered and given to the purchaser.

Ib., p. 385, sec. 1057.

Such deed is made *prima facie* evidence of the regularity of all proceedings, from the valuation of the lands to the date of the deed inclusive, *and of title in fee in the purchaser.*

Ibid.

If at such sale the land is not sold to an individual purchaser, it is bid in by the State.

1 Comp. L., p. 385, sec. 1053.

After being bid off by the State, unless redeemed, it is to be offered for sale at each annual tax-sale thereafter.

Ib., p. 393, sec. 1083.

If sold, the county treasurer shall give a certificate of sale.

Ib., p. 394, sec. 1089.

Upon surrender of this certificate to the Auditor-General, he is required to execute a deed.

Ib., 395, sec. 1061.

This deed has the same force and effect as if the land had been sold when first offered. That is, it is *prima facie* evidence of the regularity of proceedings, and of *title in fee.*

Ib., 395, sec. 1091.

But if the land is not then sold, it may be sold at any time, at the office of the Auditor-General.

Ib., p. 396, sec. 1094.

Upon such sale there, the Auditor-General is required to execute a deed.

Ib., sec. 1095.

All the provisions of law relative to deeds executed by the Auditor-General on the surrender of certificates, etc., are to apply to such deed.

Ib., sec. 1096.

These provisions, carefully examined, show that the Auditor-General's deed, whether given upon a sale of the land made by the county treasurer, or upon a sale made by the Auditor-General himself, is to be evidence of a "title in fee in the purchaser."

From the deeds exhibited in evidence in this case, it appears that the lands described therein were mostly sold for the taxes of 1866, one only being for 1865.

Record, p. 21.

The taxes for 1866, if unpaid, were returnable to the Auditor-General's office in March, 1867.

1 C. L., p. 380, sec. 1034.

Under the provisions of law, they were offered for sale the following October.

Ib., p. 383, sec. 1048.

It is to be presumed that they were bid off by the State, as the State subsequently sold them.

It is also to be presumed that they were again offered for sale as State tax lands, in October, 1868, and that they were not then sold.

In the following February, that is, *February 11, 1869*, Henry Day became the purchaser, and received the deeds offered and admitted in evidence without objection.

These deeds were, as we have seen, *prima facie* evidence of the regularity of all proceedings, and of *title in fee in Henry Day*.

1 C. L., p. 385, sec. 1057.

The Supreme Court of Michigan have held that such deeds cut off all other titles, liens and incumbrances.

Robbins v. Barron, 32 Mich., 36.

These titles were held by Day, at the time when the conveyances of the same lands were mane by the defendant, Amos Gould, acting as attorney for Cyrus F. Jackson. These conveyances were all executed in June and July, 1869.

Record, p. 18.

If the tax-titles were valid,—and this *is the legal* presumption,—Jackson had no title to be conveyed, when the deeds were executed by Gould in his name, and the deeds did not in the least affect Henry Day's title to the land.

No evidence was offered to impeach the validity of these tax-deeds, and it is to be presumed that no such evidence could be produced.

Upon these deeds Henry Day could have recovered in ejectment as against any person in possession of such lands.

Robbins vs. Barron, 32 Mich., 36.

Or he could, upon the same evidence, have recovered damages against any person cutting timber thereon. He may bring such actions now.

The gist of the plaintiff's action is, that he had been deprived of these lands by the wrongful acts of the defendant.

The evidence showed that as to so many of these lands as are described in tbe tax-deeds, the plaintiff had not been deprived of them, but still had a valid title thereto.

The defendant was therefore entitled to the charge requested, that "as *to such lands*, the plaintiff cannot recover against the defendant, as he has not been injured by such attempted conveyance by defendant."

The effect of the verdict is to give to the plaintiff, Day, damages for having been fraudulently defrauded of his title, while in fact, as

to a considerable portion of the lands, he has still a perfect title on which he can maintain judgment against the grantees, under the power of attorney from Jackson to Gould.

We submit, therefore, that there should be a reversal of the judgment.

C. I. WALKER,
Of Counsel for Plaintiff in Error.

Assignment of Errors.

The Supreme Court of the United States, of the term A. D. 1877.

AMOS GOULD, PLAINTIFF IN ERROR,
vs.
HENRY DAY, DEFENDANT IN ERROR.

Afterwards, to wit, on the first day of this same term, before the said Supreme Court of the United States, at Washington, comes the said Amos Gould, by C. I. Walker, his attorney, and says that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit:

First. In allowing the question to be put to the witness, Alexander W. Heather, and admitting his answer thereto, as follows:

Q. "From the stumps could you form a judgment of the timber that had been there?"

A. "I judge from what stumps I saw, that there had been about 15,000,000 feet cut off the lands altogether."

Second. In the refusal of the court to charge in accordance with the defendant's first request, as follows:

"To enable the plaintiff to recover in this case he must prove that at the time when the defendant, as attorney for Jackson, conveyed the land described in the declaration, he was the owner in fee of said lands, under and by virtue of an unrecorded deed of said Jackson to Anna D. Anthony."

Third. In the refusal of the court to charge in accordance with the defendant's second request, as follows:

"The evidence in this case does not tend to prove such title in fee."

Fourth. In the refusal of the court to charge in accordance with the defendant's third request, as follows:

"The tax titles put in evidence are *prima facie* evidence that title to the lands therein described was in the plaintiff by virtue of such tax deeds, at the time when said defendant, as attorney for Jackson, attempted to convey the same, and therefore, as to such lands, the plaintiff cannot recover against the defendant, as he has not been injured by such attempted conveyance by defendant, as attorney for said Jackson."

Fifth. In the refusal of the court to charge in accordance with the defendant's sixth request, as follows:

"If the jury find the deed from Anthony to Jackson, put in evidence by plaintiff, was made and recorded without the knowledge

of said Jackson, and never delivered to him, then no title to the land described therein passed to said Jackson, and the plaintiff obtained no title thereto by virtue of his deed thereof from Anna Anthony."

Sixth. In the refusal of the court to charge in accordance with defendant's seventh request, as follows:

"The power of attorney executed by said Jackson to defendant, to convey the lands therein generally described, did not of itself operate as a delivery of the deed from Anthony to Jackson, nor did it make such deed an effective instrument."

Seventh. In the giving by the court, to the jury, the following charge, namely:

"I am requested to charge you, in addition to that, that if you shall find that Jackson acted upon the deed made to him by deeding the lands afterwards to Mrs. Anthony, that then the delivery was o no consequence, he thereby affirmed the conveyance to himself, and he cannot question it, neither can Gould, the attorney under him. This is correct law, and I so charge you. I charge you also, in addition to that, that in his acting upon the title by assuming to convey the same, or rather to authorize the conveyance of the same by a power of attorney to Gould, is also a ratification of it, and the want of delivery is of no importance in this case. The title is as perfect as if the delivery had been made in the commencement."

There is also error in this to wit: That by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said Henry Day against the said Amos Gould; whereas, by the law of the land, the said judgment ought to have been given for the said Amos Gould and against the said Henry Day.

And the said Amos Gould prays that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by the occasion of said judgment, etc.

C. I. WALKER,
Attorney for Plaintiff in Error.

Supreme Court of the United States.

AMOS GOULD, PLAINTIFF IN ERROR,
vs.
HENRY DAY, DEFENDANT IN ERROR.

No. 196.

Supplemental Brief for Plaintiff in Error.

C. I. WALKER, *of Counsel.*

In the brief filed by the defendant in error counsel have gone out of the way to make an exceedingly bitter attack upon the plaintiff in error, and epithets are used that seem most unbecoming when addressed to this august tribunal upon a purely legal argument.

It may be true that the facts as imperfectly developed in the record do not present Mr. Gould, the defendant below, now plaintiff in error, in a very favorable light.

He fully believed, and had good reason so to do, that the lands in question were equitably the property of C. L. Anthony, who was largely indebted to his neighbor and old client, Mr. A. L. Williams, who had employed him to aid him in collecting the debt, (Record, p. 26, folio 79;) and that Day, the plaintiff below, was fraudulently assisting Mr. Anthony in an attempt to defraud Williams of his honest debt, although it does not appear that Gould knew

that there had been a conveyance to Day until he, Gould, had already conveyed them under the power from Jackson. (See Record, p. 17, folio 47.) To defeat this purpose of craft, Gould may have exercised some craft himself—a common but a never-justifiable course. Doubtless this very course greatly prejudiced the court and jury against him below, and it is artfully sought to be used here to prejudice this court against him in the decision of a purely legal question.

But if Mr. Gould has been ever so much in the wrong, and has thereby injured Mr. Day, still his legal rights will be as securely protected here as if he had never done a wrong. In this confidence we rest.

TAX TITLE.

While we believe there are other errors in the record, the one great error so prejudicial to Mr. Gould is the ruling of the court as to force and effect of the tax deeds put in evidence by the plaintiff, which was discussed under the IIId head of the original brief.

We deem that subject to be worthy of a fuller discussion than it then received, and we ask that this supplemental brief shall take place of the original one on this point.

Plaintiff below claims that in 1869 he was the owner in fee of the lands described in his declaration by a title not fully of record; that defendant, knowing or believing this, obtained from Cyrus F. Jackson, the apparent record owner, in June, 1869, a power of attorney, by virtue of which he conveyed these lands to certain *bona fide* purchasers, by means whereof he was defrauded of said lands.

He seeks to recover, and did recover of defendant the value of these lands.

His testimony tended to establish, as to most of these lands, the following facts:

1st. In April, 1865, the title to these lands was in Charles J. Anthony.

2d. April 1, 1865, Anthony and wife conveyed them to Cyrus F. Jackson, which deed was recorded in July following.

3d. On the 23d of June, 1865, Jackson and wife conveyed them to Mrs. Anna D. Anthony, wife of said Charles J. But this deed was not recorded until May, 1871.

4th. Mrs. Anthony and her husband conveyed them to the plaintiff, September 2, 1867, and the deed was recorded January, 1868.

So far, therefore, as this chain of title is concerned, in June, 1869, the title of record stood in Jackson, and he could convey a good title to a *bona fide* purchaser, but the real title stood in the plaintiff.

On the 14th of June, 1869, Jackson, by the procurement of the defendant, executed to him a power of attorney to convey these lands.

Under this *power*, from June 21 to July 2, 1869, the defendant conveyed these lands to *bona fide purchasers*.

The plaintiff, as we have said, claims that thereby he lost the title to these lands, and he recovered a verdict for their full value, $33,020.65.

The defendant put in evidence several deeds from the auditor-general of the State of Michigan, (known as tax deeds,) dated February and March, 1869, conveying a large portion of these lands to the plaintiff, mostly for the taxes of 1866, although one was for the tax of 1865.

Record, p. 20–23.

This was before the execution of the power from Jackson, or the conveyances thereunder.

The defendant, Gould, claims that by these deeds the plaintiff obtained a title paramount not only to the Jack-

son title, but to all other liens, encumbrances, and titles whatsoever, including his own title from Mrs. Anthony, and so, in effect, asked the court to charge, which it refused.

Record, p. 27.

This title, we claim, he still has, *unimpeached* and, so far as appears, *unimpeachable.*

He can, to-day, bring ejectment against the purchasers under the Jackson power, or any other parties in possession, *and recover.*

He has, then: 1st. The lands in fee simple. 2d. A judgment against Mr. Gould for their value.

STATUTES RELATING TO TAXES.

For the purpose of demonstrating that this is so, it becomes necessary to examine with much care the tax laws of Michigan, so far as relates to the effect to be given to tax deeds like these in question.

To this we ask a patient attention.

Property is assessed in May of each year.

1 Comp. Laws, 1857, secs. 799, 801.

Resident taxable persons are to furnish a list of taxable property in their possession.

Ib., sec. 799.

Lands unoccupied and not claimed by a resident to be assessed as non-resident lands.

Ib., sec. 805.

Taxes become a lien on the real estate on the 1st day of November.

Ib., sec. 820.

The tax list is put into the hands of the town treasurer for collection by the 15th of November.

Ib., secs. 818, 819.

Town treasurer may levy upon the property of the person assessed, and for a tax on personal pr
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Ib., secs. 819, 828.

and 1855 A 153 &c

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paid over to the county treasurer by the 1st day of February, or within a week thereafter, although the time may be extended a month.

Ib., secs. 832–3.

He is also to make out a statement of unpaid taxes to county treasurer.

Ib., sec. 833.

A transcript of this statement is to be made by the county treasurer to the auditor-general within the month of March.

Ib., secs. 848–9.

Those lands thus returned to the auditor-general as delinquent for taxes are subject to sale.

Ib., sec. 858.

A statement of them is be prepared on the 1st of July, to be advertised in the county where situated, to be sold on the 1st Monday of October.

Ib., secs. 859, 860.

They are to be sold on that and the days following by the county treasurer, under the direction of the auditor-general.

Ib., sec. 865.

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If sold to private purchasers, certificates of sale are to be given.

Ib., sec. 870.

The owner may redeem from such sales any time within a year from the sale.

Ib., sec. 873.

If not so redeemed, the auditor-general is to execute a deed to the purchaser holding the certificate, his heirs or assigns.

Ib., sec. 871.

The effect of such a deed is declared in the following words, to which I solicit the most careful consideration, especially in the light of the decisions of our Supreme Court:

"Which deed shall be *prima facie* evidence of the regularity of all the proceedings, from the valuation of the lands by the assessors to the date of the deed, inclusive, *and of title in the purchaser.*"

Ib.

It often happens that there are no purchasers for lands offered for sale for delinquent taxes. In such case they are bid in by the State.

Ib., sec. 879.

They are, however, still liable to taxation.

Ib., sec. 880.

And they may still be redeemed by any person within the year as if sold to an individual.

Ib., sec. 907.

And may be sold by the auditor-general, subject to this right of redemption, and a certificate of purchase given.

Ib., sec. 908.

If so sold and not redeemed, the auditor-general is to deed the same to the purchaser.

Ib., sec. 909.

The deed is to have the same effect as the deed already mentioned.

Ib., sec. 912.

Laws 1858 p 191 Sec

If not so redeemed or sold, they are to be sold at the October tax sales immediately following the expiration of the time of redemption.

Ib., sec. 899.

For this purpose, a list of the lands so bid off and not redeemed is to be furnished to each county treasurer, and they are to be advertised as State tax lands.

Ib., secs. 901–2

They are to be sold previous to the sale of other lands for delinquent taxes, and if the same lands thus bid in by the State, and to be offered for sale as State tax lands, are also on the list of lands delinquent for taxes, any person bidding therefor is required to bid, not only for the amount due the State on its original bid, but for the amount of current delinquent taxes.

Ib., secs. 903–4

If sold, a certificate of purchase is to be issued by the county treasurer, which entitles the purchaser at once to a deed from the auditor-general.

Ib., secs. 905–6

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If not so redeemed or sold, they are to be sold at the October tax sales immediately following the expiration of the time of redemption.

Ib., sec. 899.

For this purpose, a list of the lands so bid off and not redeemed is to be furnished to each county treasurer, and they are to be advertised as State tax lands.

Ib., secs. 901–2

They are to be sold previous to the sale of other lands for delinquent taxes, and if the same lands thus bid in by the State, and to be offered for sale as State tax lands, are also on the list of lands delinquent for taxes, any person bidding therefor is required to bid, not only for the amount due the State on its original bid, but for the amount of current delinquent taxes.

Ib., secs. 903–4

If sold, a certificate of purchase is to be issued by the county treasurer, which entitles the purchaser at once to a deed from the auditor-general.

Ib., secs. 905–6

This deed is to have the same force and effect as the one already described.

Ib., sec. 906.

If not thus redeemed or sold at public sale, these State tax-lands may be *sold* at private sale by the auditor-general for the unpaid taxes, charges, and interest, and a deed at once given.

Ib., secs. 910–11.

This deed is to have the same effect as the other deeds mentioned.

Ib., sec. 912.

It will be seen, therefore, that the auditor-general may execute "tax deeds" in four different instances, viz:

1st. Where lands are sold to private persons for delinquent taxes, and are not redeemed within the year following the sale.

2d. Where bid off by the State, and afterwards sold by certificate of purchase before the time of redemption expired and are not redeemed.

3d. Where they are bid off by the State, not redeemed within the time limited therefor, and are then sold as State tax lands at the October sale the year after they are first bid off.

4th. Where State tax lands are not thus sold for want of buyers, and are sold by the auditor-general at private sale.

Ib., sections 871, 906, 909, 912.

Laws 1855 pp 185 195 Sec 59 124 124

In each and every of these cases the force and effect of these deeds are the same. They are *prima facie* evidence of—

1. The regularity of all proceedings.
2. Of *title in fee simple* in the grantee.

Ib., secs. 906, 911.

Laws 1855 auth

THE FORM OF DEED GIVEN.

The legislature of Michigan for wise purposes—to secure the prompt payment of taxes—has not only changed the common-law rule as to the burden of proof in relation to sales of this character, but has thrown great difficulties in the way of persons attempting to defend against tax deeds. The defects in the proceedings must be very glaring.

1 Comp. Laws, 1871, p. 404, sec. 1130.

This has been the long-settled and favorite policy of the State.

Blackwood *vs.* Van Vleit, 30 Mich., 120.

A "tax deed," therefore, is *prima facie* evidence of a perfect title in the grantee. It extinguishes all other titles, liens, and encumbrances, and is title paramount.

Jones *vs.* Wells, 31 Mich., 176.

Robbins *vs.* Barron, 32 do., 36.

S. C., 33 do., 125.

The deeds in this case are all of State tax lands, and belong to the 2d class. The right to issue them and their effect is determined by—

1 Comp. Laws, p. 395–6, secs. 1092, 1093, 1096.

Dawn 1856 Rate

The above case of Robbins *vs.* Barron is directly in point, and would seem to settle the question.

These deeds were in evidence. No evidence was offered to impeach their validity.

As the case stood, Day's title to *these* lands was perfect.

As to these, the conduct of the defendant, however wrongful, did not affect that title.

The defendant was, therefore, entitled to have his 3d request charged.

Record, p. 27.

If we are right, the gross injustice of the refusal is apparent.

IV.

Counsel virtually admit that in general it is true in relation to the tax deeds of Michigan that they do furnish *prima facie* evidence of a title in fee in the grantee, but that no such effect is to be given to the deeds in question, because Mr. Day, the grantee, at the time he made the purchase, was the owner of the land, *and it was his duty to pay these very taxes*, and that he cannot in this way strengthen his former title or obtain a new one, and that although there be a form of a purchase it can only operate as a payment of the taxes or a redemption.

That there are exceptions to this general right to acquire tax titles from the State is perfectly well settled; but we think it entirely clear that this case is not within the exceptions, as we shall proceed to show.

No one has discussed this question with the clearness and logical force of Chief-Justice Cooley, of our own State.

Cooley on Taxation, 345–350.

Blackwood *vs.* Van Vleet, 30 Mich., 121.

He lays down the rule that there are two classes of persons who are precluded from thus acquiring tax titles.

1. Those upon whom is imposed the duty *to the State* to pay the tax, as the sale grows directly from their own default.

2. Those who are so situated in relation to the land or others interested therein that it would be highly inequit-

able for them to acquire such a title which becomes paramount to all others.

Ib.

In the first instance, where the duty is to the State, the purchase operates as a payment of the tax, or, if after sale, as a redemption.

In the second, it may so operate in some instances, while in others the purchaser may have a perfect title as to all the world except those he has wronged, and as to them, he may hold the title for their benefit.

Some instances of this second class will illustrate our meaning.

Thus, a tenant in common being in default in relation to his own share of a tax, if he buy the whole title, holds it for the benefit of his co-tenants. In other words, as against *them* he gets no title.

Cooley on Taxation, 346.
Page *vs.* Webster, 8 Mich., 263.
Butler *vs.* Porter, 13 do., 292.
Cooley *vs.* Wateman, 16 do., 366.
Dubois *vs.* Campan, 24 do., 368.

So a mortagor in possession, whose duty it is to pay the taxes.

Cooley on Taxation, 345, 347.
Chateau *vs.* Jones, 11 Ill., 322.
Chickering *vs.* Faile, 26 do., 507.
Fuller *vs.* Hodgson, 25 Me., 243.
Brown *vs.* Sanders, 44 Ill., 475.

So where the mortgagee is in actual possession, receiving the rents and profits, and therefore bound to pay taxes.

Ib.

So where a tenant is in possession and under obligation to his landlord to pay taxes.

Cooley on Taxation, 345–9.
Crothers *vs.* Weaver, 7 Kan., 110.
Blake *vs.* Howe, 1 Aik., 307.
Glancy Elliott, 14 Ill., 457.

So one in possession, under a contract of purchase and under obligation to pay taxes.

Haskell *vs.* Patterson, 42 Me., 244.
Cooley on Taxation, 347, note.

Or the owner of a life estate, and bound to keep down the taxes.

Vancy *vs.* Stevens, 22 Me., 334.
Prettyman *vs.* Walston, 34 Ill., 175.
Higgins *vs.* Crosby, 40 do., 260.

Or an agent employed to pay taxes for his principal.

Oldham *vs.* Jones, 5 B. Mon., 257.
Cratz *vs.* Campbell, 8 Kan., 90.

This rule as between parties is in the nature of an estoppel. The party who has violated his duty, failed to pay the taxes, which as between themselves he was bound to pay, cannot, *as against the party thus wronged*, set up a tax title springing from this wrong. As between him and the State he may or may not have been in default. This makes no difference. Thus the agent to pay taxes owed no duty to the State, and against everybody but his principal had a perfect right to buy the tax title.

There is no ground for the pretence that Mr. Day was under any obligation to Mr. Gould, or any other person, to pay the taxes on these lands for 1866.

We now proceed to show that, in the sense of the rule, he owed no duty *to the State* in relation thereto.

That duty must of course be a legal duty. Upon whom is the duty imposed of paying taxes upon real estate in the State of Michigan?

We say—

1st. Upon the occupant, or the party actually assessed therefor, if there be such occupation or assessment.

2d. On the owner thereof when the same is assessed, or when the tax becomes a lien.

It is only of such persons that it can be collected.

1 Comp. Laws, 1871, secs. 1003, 1006.

All subsequent purchasers take the property subject to the lien of the tax, but they owe no duty to the State in relation thereto. It is like any other lien upon the property they purchase. It imposes no personal duty.

Nor is there, so far as we can find, a single case that is not qualified or overruled that holds any different doctrine.

All the following cases, cited upon the other side, are in harmony with this rule.

Mass. *vs.* Shears, 25 Cal., 45.
McMain *vs.* Whelan, 27 do., 318.
Garwood *vs.* Hastings, 38 do., 223.
Smith *vs.* Lewis, 20 Wis., 354.
Bassett *vs.* Welch, 22 do., 176.
Vancy *vs.* Stevens, 22 Me., 331.
Blakely *vs.* Beston, 13 Ill., 708.
Pleasants *vs.* Scott, 21 Ark., 370.
Ballance *vs.* Forsyth, 13 How., 18.

The following cases all show that the duty to the State to pay the tax springs either from actual occupation or ownership when the tax was assessed or became a lien, or from a direct assessment to the party.

Douglas *vs.* Dangerfield, 10 Ohio, 152.
Voris *vs.* Thomas, 12 Ill. 442.
Glancy *vs.* Elliott, 14 Ill. 456.
Kelsey *vs.* Abbott, 13 Cal., 419.
Garwood *vs.* Hastings, 38 do., 223.
Basset *vs.* Anecolin, 36 do., 322.
Croppinger *vs.* Plin, 33 do., 422.

But it is claimed that this case is governed by the case of Lacy *vs.* Davis, (4 Mich., 154.)

That case has been virtually overruled, and if not, it has no application to this case.

There, one Raynor took possession of some real estate in May, 1844. In October, 1844, he bid off the property at a tax sale for the taxes of 1842, and obtained a deed in 1847.

The court held that by *taking possession* he became bound to pay the taxes which were a lien at the time, and say: "*It is the possession which creates the disability in the purchaser.*" The whole force of this case turns upon the fact of actual possession when the title was purchased, and so it has been understood ever since, and in the more recent case of Dubois *vs.* Campan, (24 Mich., 368,) Judge Christiancy qualifies it by appearing to limit the restriction to a possession *when the taxes are imposed and become due.* He says:

"It may be regarded as settled in this State, that one in possession of land, claiming it as his own, is bound to pay the taxes imposed upon it—certainly such as are imposed and become due *during such possession;* and that by neglecting this duty, suffering the land to be sold for taxes and holding it in himself, he can acquire no title as against any one."

The doctrine of that case is, that it is such a "possession,"

not a claim of title, that imposes the duty to pay taxes, and then if a tax title is purchased it may operate as payment.

But the case of Lacy *vs.* Davis is criticised, disapproved, and substantially overruled by the recent masterly opinion of Judge Cooley, in which the whole court concurred, in—

Blackwood *vs.* VanVleit, 30 Mich., 122.
See also Cooley on Taxation.

It is also directly at variance with—
Coxe *vs.* Gibson, 27 Penn., 160.
Lybrand *vs.* Haug, 31 Wis., 232.

In the last case, the court, in a similar case, say:

"He was under no legal obligation to pay taxes assessed upon the lands before he became the owner thereof, or before he went into possession claiming to be the owner. He could pay such taxes, or refrain from doing so, as he pleased."

But here there was no pretence of possession by Day when he bought the tax title, and if Lacy *vs.* Davis is still law in Michigan it has no force here, for the very fact which the court held created the duty does not exist, viz., "possession."

Nor was Day the owner of the land when the tax was assessed and became a lien, in 1866, or when the default in the payment of the tax occurred in February, 1867.

The land was assessed in May, 1866, the tax became a lien on the 1st of December following, and was payable by the 1st day of February, 1867, and at that time the default occurred. It was advertised in July to be sold in October of the same year, and was so sold, and bid in by the State.

On the 2d September, 1867, a few days before the sale, Day gets his deed from Mrs. Anthony, but the deed to her is not recorded and is lost. At that time, and up to June, 1869, the title of record stood in Cyrus F. Jackson, and a conveyance by him to a *bona fide* purchaser would have entirely defeated Day's title. Although the *real*, he was not the *apparent* owner. No one understood this better than Day himself.

Up to September 30, 1868, he had the right to redeem the land from the sale, but this would have availed him nothing if Jackson conveyed to a *bona fide* purchaser. As we have seen, he owed no duty to the State, to Jackson, or to any one else to pay this tax. Owing no such duty, he had a perfect right to purchase from the State the tax title, as Judge Woodruff said in Coxe *vs.* Gibson, (27 Penn., 160 :)

"There is nothing in reason and law to prevent a man who holds a defective title from purchasing a better at a treasurer's sale for taxes. It is a very common remedy for defective titles."

The State would not be injured or its policy violated, while if there was no redemption by Jackson, he gets a perfect title in the place of an imperfect one, and if redeemed he gets back his money with a large interest.

Acting, therefore, at the dictation of an enlightened and sagacious self-interest, instead of redeeming the land from the tax, in May, 1868, he *purchased* the right of the State in the lands for the tax of 1866, and the same not being redeemed within the time limited therefor—in February, 1869—he procures the ordinary tax deed from the auditor-general.

Record, p. 20–23.

This, as we have seen, *prima facie* at least, gave him a

perfect title to this land, not only as against Jackson, but as against every one else.

It now suits his purpose, that he may enhance his damages against Gould, to assume that that purchase was no purchase, because he had no right to make it; that it was a mere redemption, and conveyed no title.

We have already admitted that if the legal duty to the State to pay this tax was imposed upon Mr. Day, then such would be the operation of the attempted purchase, although the wisdom and propriety of this rule is seriously questioned.

Cooley on Taxation, 349.

It confers no benefit upon the State and no protection to any person whom the tax-payer is bound to protect. Nor should strangers take advantage of a failure to perform a duty to the State which the State has itself waived.

But we submit that it is entirely clear that Day owed no such duty, and therefore he had a clear right to buy these tax titles, and that the tax deeds are to have their usual force and effect as evidence of title in fee in Mr. Day.

Should it be held otherwise in this case it would not estop him from hereafter bringing ejectment on his tax title, and recovering thereon.

SUPREME COURT

OF THE UNITED STATES.

No. 196.

AMOS GOULD,
Plaintiff in Error,

vs.

HENRY DAY,
Defendant in Error.

Additional Brief of Defendant in Error.

Taxes in Michigan become a lien on the land on the first day of November, of each year.

Compiled Laws of Michigan, 1857, Sec. 820.

The tax is required to be paid on or before the first day of February, following.

Sec. 819.

A statement of the unpaid taxes is to be forwarded to the Auditor General by the 1st of March, thereafter.

Sec. 849.

The Auditor General is required to give notice of sale of property by the County Treasurer on the first Monday of October, next thereafter.

Sec. 863.

Sale is to be made for the amount of the tax, together with the costs and interest thereon, on the first Monday of October.

Sec. 859.

In case no purchaser is found at the sale, the County Treasurer is to bid off lands for the State.

Sec. 879.

But such lands are sold subject to taxes subsequently imposed.

Sec. 880.

The State bid in these lands at the sale in October, 1867, for taxes of 1866.

Folio 61–63 of the record.

Any person is allowed one year from day of sale for the redemption of the land before the title of the State becomes absolute and can redeem by paying the amount due for taxes, and interest at the rate of 25 per cent. per annum.

Sec. 907.

In this case the time for redemption by the owner expired on the first Monday in October, 1868.

Any person is also authorized to buy *the State bid* and take a certificate of the same before the time of redemption has expired by paying the same that the owner would be obliged to pay to redeem his land, and also may purchase the State title after the same has become absolute.

Sec. 908, 909, 910.

Three methods were open to the owner for cancelling this tax, viz: (1) by paying in his money in

the form of redemption under section 907, or (2) by taking a certificate of the bid of the State under section 908, or (3d) by purchasing the title of the State after the same had become absolute.

Sec. 908.

The purchaser of a State title under section 910 was entitled to a deed of the land one year after sale, which in this case was in October, 1868.

The defendant Day being owner and having a record title, purchased the State bid and took a certificate of the same on the 9th day of May, 1868, about five months before time of redemption expired and before the State could obtain an absolute title.

Fol. 61 of the Case.

After October, 1868, and after the time of redemption had expired, he returned his certificate and received not a grant in form, but a *release and quit-claim deed* from the State, of all their right, title and interest in this property, acquired by the original sale, subject to all taxes duly imposed thereon.

Folio 61 and 62 of the Case.

The defendant Day having purchased the property in September, 1867, was the owner and the record owner in May, 1868, when he purchased the State bid.

At this time the plaintiff Gould had no interest in this property nor the grantees taking under the power of attorney to him, but Jackson had, as he and Gould claim.

Fol. 34, 37, 39, 45 to 48.

POINTS.

The 3d request of the plaintiff in error was that the Court should charge the jury, that the tax titles were *prima facie* evidence that the title to the lands embraced in the tax deeds was in the defendant in error (Day) at the time that Gould, as attorney for Jackson, attempted to convey them, and that *therefore* the plaintiff cannot recover as to those lands *as he has not been injured* by such attempted conveyance.

The judge refused so to charge and the plaintiff in error excepted to said refusal.

The above request contains two propositions, one depending on the other. Both must be maintained in order to sustain the exception. They are:

1st. That the tax deeds taken by the defendant in error are *prima facie evidence* of a paramount title in the defendant in error, which have cut off his original title and

2d. That *therefore* he has not been injured by the act of Gould in conveying the lands.

The ground the defendant in error takes is, that the tax deeds were *not prima facie* evidence of a paramount title in the defendant in error and that if they were so it does not follow that the defendant has not been injured by the acts of the plaintiff in error, and that both of these propositions must be maintained by the plaintiff in error to justify the charge as requested.

Before discussing these points it will be of service to keep in mind a few facts established by the record.

1. The holder of the original title and the purchaser of the tax titles are the same person.

2. When he purchased and took the legal title,

the taxes were a lien on the lands for which the lands were sold after his purchase.

3d. The deed from Anthony to the defendant in error, which conveyed the legal title, does not show but that the owner assumed these very taxes.

Fol. 32.

4. The plaintiff in error is a person who had no possible interest in the title at the time the defendant in error took the tax deeds.

5. No subsequent acts of either party have given him any interest in or claim upon the property, or laid the defendant in error under any obligation to him in relation to said land in any possible way.

6. The plaintiff in error is attempting to interfere and to dictate in relation to a transaction between the original owner and the State, in order to shield himself from the consequence of his fraud.

7. Being a lawyer, he must be expected to know the law and decisions of Michigan on the subject of the effect of tax deeds.

We will now proceed to the exceptions to the Judge's refusal to charge as requested.

I.

We maintain that the Court was right in refusing to charge that the tax deeds put in evidence are *prima facie* evidence that the title to the lands therein described was in the plaintiff (defendant in error), by virtue of such tax deeds, at the time the said defendant (plaintiff in error), as attorney of Jackson, attempted to convey the same.

First.

The Statute of Michigan, Compiled Laws, section 912, provides that a tax deed shall be *prima facie* evidence of all previous proceedings on which it is founded, and of the title in the purchaser.

This must mean *prima facie* evidence of title in the hands of one who is authorized to purchase. If one is not authorized to purchase, then the tax deed, although one in form, is declared by law not a deed, and consequently gives no title.

All the decisions in Michigan on this subject hold that a tax title made to one who is bound to pay the tax is only a redemption. Certainly then a a tax deed is not *prima facie* evidence of title in all cases. The statute cannot be construed as meaning that a tax deed shall, in fraud of the State or other parties, be considered a *prima facie* evidence of title.

Second.

The general doctrine on this subject is that one who is under any obligation, legal or equitable, to the State or to third parties to pay a tax, cannot obtain a new and paramount title by purchase at a tax sale made to enforce the payment of the said tax.

Cooley on Taxation, 346.
Blackwell on Tax Titles, 4th Edition, p. 99, 444. Original page 400.

The difficulty in applying this doctrine is to ascertain who owe any such obligations to pay the tax, and it is an important element in the discussion in many cases as in the one at bar who is *prima facie* bound to pay the tax.

Third.

The case of Lacy *v.* Davis, 4 Michigan R., 154, has been the leading case in Michigan on this subject. It has been quoted in almost every every case on tax titles in that State as an authority.

It establishes the doctrine in relation to tax titles as follows:

"One in possession of land claiming title can ac-
"quire no additional interest by suffering the land
"to be sold for taxes and becoming purchaser if
"such taxes were a lien upon the land at the
"time of his taking possession."

Such a purchase was held to be only a redemption, and a method of paying the tax certainly not *prima facie* a new title subversive of the old.

Fourth.

The same doctrine is held in other States:

Smith *vs.* Lewis, 20 Wisconsin, 373.
Chambers *vs.* Wilson, 2 Watts, Penn., 495.
Steiner *vs.* Cox, 4 Penn. (Barr.), 15.
Jenks *vs.* Wright, 61 Penn. St., 410.

These cases hold that a purchase by a former owner, of the State, after its title has become absolute, is only a redemption. The case of Steiner *vs.* Cox is the leading case in Pennsylvania on this subject.

Fifth.

The doctrine of Lacy *vs.* Davis, as the brief of Mr. Lothrop will show, has been recognized in Michigan as the law of the State, without

any limitation, until the case of Blackwood *vs.* Van Vliet, 30 Mich., 119, which we shall notice hereafter. In Dubois *vs.* Compan, 24 Mich., 368, Judge Christiancy has given an elaborate decision on the subject of tax titles. He says:

"It may be regarded as settled in this State that one in possession of land, claiming it as his own, is bound to pay the taxes imposed on it; certainly such as are imposed and became due during such possession, and that by neglecting this duty and suffering the land to be sold for taxes and bidding it in himself, he can acquire no title as against any one. Such sale is based on his own default."

He quotes Lacey *vs.* Davis—as his only authority. In this case a joint owner the party who should have paid the tax did not. The land was sold to a third party, who took the title from the State. The said joint owner of part of the land subsequently purchased this tax title and held it as against other joint owners with him of the original title. The Court, Judge Christiancy, held that to allow this party to set up this title to defeat that of other joint owners with him, under such circumstances, even though he had bought the tax title from a third party who owed no obligations to pay the tax, would be to enable him to take advantage of his own wrong to the injury of others, and to encourage fraud.

The Court held here that the tax title was not *prima facie* evidence of a paramount title, but only a payment of tax (page 371).

In the same case, on the trial below, the Court was requested to charge that the tax deed in question enured to the benefit of the other joint owners, and that they were not barred by this tax deed. The Court refused so to charge. On the appeal, Judge Christiancy held that the Court below was wrong in refusing so to charge; in other words,

that the tax title was not *prima facie* evidence of paramount title according to the laws of Michigan.

Sixth.

The broad doctrine of Lacey *vs.* Davis received a slight limitation in the case of Blackwood *vs.* Van Vliet, 30 Mich., 119.

In this case the defendant claiming adversely to the original owner merely *occupied* the land, with no obligation to the owner to pay the tax, the tax having been assessed before the occupancy of defendant. The defendant took a tax title on a sale for taxes assessed before his occupancy. The question was, as the judge put it, whether *occupancy merely*, raised a presumption of duty towards the State, when it was shown that the occupant was not in possession until after the assessment of the tax, and whether the occupant was bound to pay the tax of the original owner without any title from him or agreement to that effect expressed or implied. This, he states, would be *unjust* and *inequitable*.

Seventh.

The doctrine of Lacey *vs.* Davis remains the law of Michigan to this day, and binds this Court in this case, with the slight modification above named, which is that, for the purposes of justice and equity, any *purchaser* of a tax title who claims or has occupied land, may show that he owed no obligation to State or third persons to pay the tax, to enforce which the sale is made, and may hold a tax title. If he does not show this, and does not show the former doctrine unjust and inequitable, *prima facie* as the law of Michigan now

stands, his tax title is void. It is proper to remark here that the same modification seems to have been allowed in other States, but it is always, in favor of a party who, for the sake of equity, has a right to claim a modification of the rule, but never in favor of a stranger.

See Coxe *vs.* Wolcott, 27 Penn. St., 154.
Pleasants *vs.* Scott, 21 Arkansas R., 370.
Blakely *vs.* Beston, 13 Ill., 708.

Eighth.

We submit that the doctrine of all the cases, certainly in Michigan, is that when the owner of the original title allows a sale for taxes which were a lien on the property when he took the title and purchases under such sale, or takes a tax title from the State, it is *prima facie* a redemption until he shows it is not. No case to the contrary can be found. This doctrine is founded on sound reasons:

1. The owner has voluntarily assumed the place of the former owner, whose duty it was to pay the tax.

2. He has done it, knowing the taxes due on the property, which are a matter of public record.

3. In the case where both grantor and grantee are non-residents, as in this case, and the land is the only security of the State for the payment of the tax, the grantee must be supposed to have assumed it as far as the State is concerned.

4. It is an absurdity to say that the owner seeks to destroy the original title which he has voluntarily

assumed, paid for, and respecting which he owes no obligation to anyone, and to substitute therefor an uncertain tax title.

5. Any other doctrine would be subversive of the rights of the State and of all law on this subject, and open the door to fraud and litigation.

Ninth.

The law that tax deeds are sometimes to be considered only payment or redemption, is founded on, and is really the application of the doctrine of merger under another name. When the defendant Day, being owner of the land, allowed it to be sold for taxes, and bought the certificate of sale from the State, and afterwards took a tax deed from the State, according to the well-established principles of the doctrine of merger, the rights under the certificate and tax title would *prima facie* merge in the fee held by the owner, in the same manner, and for the same reason that a mortgage or other interest, legal or equitable, would merge when assigned to the owner of the fee.

It will also be found that the limitations which have been put upon the law of merger, as formerly held for the purpose of securing equity in special cases, have also been allowed in the law relating to tax tiltles, as appears in the case of Lacey *vs.* Davis, above named.

One of these principles is that, the intention of the owner of the fee, when he takes to himself another interest in the land, shall be followed This was expressly decided in Coxe *vs.* Wolcott, 27 Penn. St. 154, and Pleasants *vs.* Scott, 21 Arkansas, 370. Another principle is, that when two estates, legal or equitable, meet in the same person, it is no concern of a stranger what the *intent* of

the owner is, or when that intent shall take effect. As long as the owner holds the land he may hold his interest as to merger in abeyance, without question from a stranger. A leading case on this subject is James *vs.* Morey, 2 Cowen, 287, Woodworth's opinion.

This was a case of an assignment of a mortgage to the owner of the fee. The question was whether there was a merger. The Court, speaking of the owner of the fee and assignee of the mortgage, say, "while the land is his, and until he made a disposition of the property, and until some person acquired an interest, he was at perfect liberty to consider the mortgage merged or not, as might be most beneficial. If the question is to be decided by intent, express or implied, when does it become fixed? Certainly not until some one acquires an interest, and thereby obtains a right to draw it in question. It would be a novel principle that a stranger should say "you once declared the mortgage merged, and although it was indifferent to all the world how you treated it, you are bound by your election."

Logically, and on equitable principles, the same doctrine should be applied here to prevent the plaintiff, Gould, from questioning the intent of defendant Day in the taking of the tax deeds.

See also Cliff *vs.* White, 12 N. Y. 520, Johnson's opinion.

Had the defendant in error wished to get a paramount tax title, he would have waited until the title of the State had become absolute, and then have purchased it, or he would have allowed or procured some stranger to have purchased the title from the State and then have purchased from him.

No intention of, or reason is shown for the defendants keeping the tax title outstanding, to the destruction of legal title.

Tenth.

The argument thus far has been upon the supposition that there were no parties but the defendant Day and the State concerned in the payment of the tax of 1866 and sold therefor. The principle is well established that no tax title from the State will be allowed to stand as a paramount title where third parties are concerned in it as mortgagee, judgment creditor, or as having any other claim upon the property.

Cooley on Taxation, 346 and 348, says, "a pur-"chase by one whose duty it is to pay taxes shall "operate as payment only. He shall acquire no "rights as against third parties." "The cases are clear on this point." Jackson, at the time the defendant Day allowed the lands to be sold for taxes, and at the time he took the deed from the State, had a claim on the land for services to the amount of $781, which the plaintiff Gould attempted to collect, and which he will not now be allowed to deny (fol. 45 of case). Having committed the fraud in collecting this claim, he cannot now shield himself from the consequences of his acts by denying that Jackson had any claim.

It follows that the defendant Day could not purchase a paramount title from the State, and thus cut off Jackson's claim.

Eleventh.

It is apparent from the form of deed given by the State to the defendant Day, fol. 61, that the State did not attempt to convey an absolute title. The deed is only a quit-claim; they do not grant, bargain and sell. The *remise, release and quit* claim only, fol. 62. This form of deed is not *prima facie* the grant of an absolute title unless it be given to

a stranger. To one claiming title it is what it purports to be—only a release of a claim.

It is apparent that it is such from the fact of the State taking only what is due for taxes and costs, and making the deed subject to all taxes assessed thereon, fol. 62.

Twelfth.

Thus far we have discussed this question on strictly legal principles. All the cases show that the modifications of the strict rules once laid down as in Lacey and Davis, are based on *equitable considerations alone*, and in favor of one who has some claim to equity in the original transaction, and as far as we have been able to find, either in favor of an original owner or of the purchaser of the tax title to subserve the equities which arise out of the circumstances.

The plaintiff, Gould, and Jackson, for whom he was acting, have assumed, in all their dealings with this property, that the tax deeds of Day did not destroy the original title. At the time Gould sold the property he knew of Day's tax deeds, from the records. He mentions them to Jackson, fol. 34, 38; said he was looking them up on the record. He found them of record as his letter fol. 43 shows, and he produces certified copies from the record on the trial.

With these tax deeds before him he assumes to sell *something* that belonged still to Jackson. He takes a consideration for that *something*. He cannot now be allowed for the purpose of shielding himself from this fraud to say he sold *nothing*.

He assumed that Jackson had an interest and title, and says in fol. 34, I suppose the lands have been sold for taxes, *but* I can sell *your interest* for

a fair price if you are "willing. Please write me and "say if I may sell your interest in those lots, and "what I shall do, generally, to ascertain to what lands "you have title to." Having thus assumed with a knowledge of the tax deeds that Jackson still had an interest and a title in the lands, and having sold the lands with such representations, and as attorney for Jackson, and having thus committed a fraud on the defendant in error, the plaintiff cannot now, in good conscience, be permitted in justification of such fraud to say that Jackson had no interest in the land which could be sold, and that when he did thus sell he commited a fraud on the purchasers.

Thirteenth.

When Gould, being a lawyer, conveyed the land to his son-in-law, fols. 26, 51 and 52 of record, it cannot be doubted that he did it on the assumption that if defendant Day's tax titles were ever set up as giving a paramount title the purchasers from Gould could hold and show them only a redemption, or that they were for some reason invalid. His care in looking up the tax titles, and his remark in fol. 43, "let Mr. Day settle with the purchasers now," all indicate this as his plan.

The law will not allow this plaintiff to stand in the position of pleading in defence of his fraud that the tax titles were paramount, and for the sake of defending the title he sold, to say they were not paramount. The judge was right with all this evidence before the jury to refuse to charge them, that these tax titles before them were *prima facie* evidence of paramount title in the defendant Day, and therefore he was not injured by the sales of Gould.

Fourteenth.

There is nothing inequitable in the choice of the defendant Day to take a quit-claim deed from the State, rather than to redeem in form. Three methods of removing the burden on his property were open to him; by redemption, buying the State bid, before their title became absolute, and by buying their title after it became absolute; he chose the second method. A whim-mistake ignorance accident, may have decided the method he followed.

The State gets its tax and no person is injured by it, and therefore no third person can demand that the transaction shall be regarded as a payment, redemption or sale. None but an interested party can raise these questions. No case can be referred to where a stranger has been allowed thus to interfere.

See James *vs.* Morey, 2 Cowen, 287.
Judge Woodworth's Opinion.

In Cooley on Taxation, page 348, "the author "states that cases are clear that where third parties "are concerned the owner cannot set up the tax "title in his own favor, but not so clear where there "is any one to whom there is no duty to pay the "tax, that he can set up the neglect of the owner "to pay the tax to defeat the owner's tax title."

The doctrine is, that although the legal owner is bound to pay the tax to the State, and as between him and the State a purchaser at tax sale would be a redemption, yet that a stranger has no right to insist that such purchase of a tax title is a redemption. It is no business of his.

The converse of this must be equally true that a stranger has no right to say that such purchase is *not* a redemption for the same reason. He has no concern in the matter.

The author of Cooley on Taxation is the same person who gave the opinion of the Court in Blackwood *vs.* Van Vliet, 30 Mich., 119, and the judge and the author cannot be supposed to be in conflict.

Fifteenth.

If a stranger cannot question a transaction between the State and the original owner as to the method of paying the tax, it follows that a stranger for a most fraudulent purpose cannot interfere with the transaction.

The fraud in this case was gross in every respect. It was by an attorney at-law. He deceived his own client. He counsels him to deceit and falsehood. He refuses to account to him for his conduct or for the proceeds. He sold all the land but 1,200 acres to his own son-in-law. He got for this 1,200 acres sold to the stranger, $10 per acre, and for that sold to his son-in-law one dollar and sixty cents per acre, and even at this rate he put nearly $8,000 into his own pocket, and then says "let Mr. Day settle with the purchaser now," fol. 26, 43, 48, 49.

It is doubtful if a case of fraud so gross in all its features ever came before this Court.

It is not possible that such a party, for such a purpose, can have any right to dictate what the transaction between the defendant Day and the State was

II.

The judge was requested to charge, not only that the tax deeds of the defendant Day were *prima facie*

evidence of title in him, but that *therefore*, the defendant Day, had received no injury by the attempted conveyances of Gould. Both propositions were united in one request, and the latter as a necessary inference from the former. Both propositions must be true, or the Judge would have erred in so charging as requested. We aver that if the tax deeds *were prima facie* evidence of defendant Day's title, it does not follow that he has received no injury from the acts of Gould. We maintain that it is plain from the evidence in the record that he received great injury therefrom.

The sale by Gould necessarily brings in other claimants to the title of defendant Day. It puts him to the trouble and expense of bringing a suit for his land against these claimants, exposes him to the danger in such suit of not being able to sustain the regularity of the proceedings on which his tax title is founded, which, although *prima facie* regular under the laws of Michigan can always be attacked, and shown to be irregular.

Cooley on Taxation, 355.

It is well known that scarcely a tax title in any state can be defended by showing the regularity of the intricate proceedings on which they are founded. In the State of New York no tax title has ever been maintained. Another injury which he sustains by acts of the defendant in selling the lands, is in inducing others to cut off the timber which the record shows has been done on some of the lands since the sale by Gould, fol. 58 and 59, and by committing other trespasses under claim of title from Jackson. We say then the charge of the judge would have been wrong if made in the form requested by plaintiff in error, because although the defendant Day had a *prima facie* good title to the lands by his tax deeds, still he might, and record shows has suffered injury from Gould's attempted sale.

III.

First.—The judge not only did not charge as requested by the plaintiff in error in his third request (fol. 84 of record), but he did charge (fol. 87), in relation to the title, that the defendant, Day, was, at the time of the conveyance by Gould, the legal owner of the lands. To this charge the plaintiff in error excepted. We fail to see the force of this exception. Defendant Day was proved undoubtedly to be the owner of the original title, and also the owner of the tax title, if the tax deeds gave any title. From one or the other, or from both these sources he must have been the the *legal owner in fee.* It matters not for this exception from what source his title came. He was undoubtedly the legal owner in fee.

Second.—It should be borne in mind in this case that the tax deeds were put in evidence and were before the jury. The judge did not say they were *not prima facie* evidence of title, but only that the defendant, Day, *was legal owner in fee of the lands.* As there was no charge to the jury or request to charge as to what was the intent of the defendant, Day, in taking them, whether to pay his tax or thereby obtain a new and paramount title, the whole matter was before the jury to find the *intent* of the defendant, Day, in taking them and the effect of them as to mitigating the damages done by the defendant, Gould.

See Coxe *vs.* Wolcott, 27 Penn, 154.

IV.

The object in this case is to make the decision turn on a most trivial and technical point of law,

and thereby defeat the ends of justice and to uphold a most shameful fraud practiced by an officer of the Court.

The fraud is palpable ; the trial was fair ; all the facts were before the jury, on which the real issues of the case should rest.

The plaintiff in error has the gains in his possession. It is submitted that no evidence has been allowed or rejected, and no charge made or denied which could substantially affect the the decisions of the jury.

HENRY DAY,
of Counsel.

Supreme Court of the United States.

No. 196.

AMOS GOULD,
Complainant in Error,
vs.
HENRY DAY,
Defendant in Error.

Error to the Circuit Court of the United States for the Eastern District of Michigan.

BRIEF OF DEFENDANT IN ERROR.

DETROIT.
FREE PRESS BOOK AND JOB PRINTING HOUSE.
1877.

SUPREME COURT

OF THE

UNITED STATES.

No. 196.

AMOS GOULD, *Plaintiff in Error.* vs. HENRY DAY, *Defendant in Error.*	*Error to the Circuit Court of the United States for the Eastern District of Michigan.*

BRIEF OF DEFENDANT IN ERROR.

In 1869 the defendant below, Amos Gould, a lawyer of Owosso, Michigan, by a most adroit and singular fraud, swindled Henry Day, of New York, plaintiff, out of a large body of pine lands in Michigan. Day brought an action on the case and recovered the judgment that is now complained of.

A brief outline of facts, as shown by the record, will aid in a just comprehension of the case. The lands in question were derived from the United States under a railroad land grant, and on April 1st, 1867, were owned by Charles J. Anthony, of New York city.

On that day he made a voluntary conveyance of the same to his brother-in-law, Cyrus F. Jackson, which deed was duly recorded in July following. In June of the same year, Jackson made a deed of the same lands to Mrs. Anna D. Anthony, the wife of said C. J. Anthony. This deed was *not recorded*, and when looked for some years later, could not be found, and was not found till about May, 1871, when it was recorded.

In September, 1867, Charles J. Anthony, who was indebted to Mr. Day in about $38,000, made a bargain with Mr. Day to give him these lands in settlement of this debt, and accordingly Mr. and Mrs. Anthony, by deed of September 2, 1867, recorded in January, 1868, conveyed these lands to Mr. Day. Mr. Day had no knowledge of the break in the record title; and Jackson seems also to have been ignorant of the fact; but in the Spring of 1869 he seems to have learned in some way, as appears by his letter of May 24th, 1869, that *two sections* had been left standing in his (Jackson's) name, when Anthony made out the deeds. Jackson had a claim against Anthony, Day & Edmunds, which, in August, 1869, he seems to have put at $781, and he thought he would make it out of these two sections of land. For this purpose he seems to have written to a friend in Owosso, Michigan, where Gould lived, and that friend put the letter into Gould's hands to be answered. Gould was a lawyer. He knew about the original title to these lands, which were derived through a land-grant railroad, and was himself "a large owner of these railroad lands," "and was prepared to trace out the title to any of them."

This put Gould into communication with Jackson, and he wrote him May 22d, 1869, that he had discovered that three 40-acre lots stood in his (Jackson's) name, and that he could sell them for him at a fair price.

On May 24th, 1869, Jackson replied to Gould that he

(Jackson) understood that C. J. Anthony, in "making the deeds," had left sections 13 and 23 "standing recorded in my name;" that Mr. Day, through James L. Anthony, had written to him to have him deed the same back to him, and that he had refused to do it unless he (Day) would see him (Jackson) paid what was due on work done for him and others. And he tells Gould, that if he had any title to it, he would not give it up till he was well paid for his work, and for waiting.

Gould was thus distinctly informed that Jackson was not the real owner; that Day claimed to be, and that Jackson only claimed to hold it to secure his claim.

Gould at once wrote to Jackson, saying that he was sorry that he had written to Day as he had, and that he must be careful if he wrote him any more letters, to claim that he had got these lands through an arrangement with Anthony, and to keep secret the fact that Gould was acting for him.

On June 9th, Gould wrote Jackson that he had ascertained that on April 1st, 1865, Anthony had deeded sections 13 and 23 to him (Jackson), and afterwards, on Sept. 2d, 1867, had deeded the same lands to Day. These are the deeds which embraced all the lands in question. But Gould suppresses all mention of this, for his design now was to defraud both Jackson and Day. In a very innocent way he suggests to Jackson, "in order that I may aid you and protect your interests in regard to these lands, *and other lands similarly situated*, it will be best for you and your wife to execute and acknowledge the enclosed power of attorney, and send it to me." "There *may* be other lands similarly situated in other counties, and in order to take charge of whatever there may chance to be, I make the power of attorney broad enough to cover all of it." He at the same time cautioned Jackson, if he got any letters from Day, or any one else on the subject, to make no answer until he had let Gould know what they said, and had taken

Gould's advice what to reply. The power of attorney, after a few specific descriptions, contained an omnibus clause of any lands in the State of Michigan.

This power of attorney was dated June 14th, and probably reached Gould on June 16th or 17th; and on June 21st, 1869, he sold and conveyed to Morris Osborn, *his son-in-law*, 1,280 acres for $1,920; on June 26th, to Van Duesen & Smith, 120 acres for $1,200; on June 30th, 400 acres to Osborn for $400; on July 2d, 3,843 acres to said Osborn for $4,875, and on July 1st, to said Osborn 100 acres for $100.

Thus, within two weeks from the time he received the power of attorney, he had sold 5,743 acres of land for $8,495; of which 5,623 acres was sold to his own son-in-law, Osborn. And all that Jackson claimed was $781!

After this scoundrel had sold 1,280 acres for $1,920, he wrote Jackson, June 24th, that he thought he should be able to make his claim in a few months, but he couldn't say certain, till he had perfected examinations, and then tells Jackson to answer no letters till he has sent them to him (Gould) and had his instructions; tells him to lie about his title, to say he owned the lands, had bought and paid for them.

About this time Jackson was pressed by Jas. L. Anthony in behalf of Day, and told to make out his bill, if he had any. This on July 19th, Jackson communicated to Gould, and said that if Day paid all his claims he wished to give him a deed.

Gould, in reply, was good enough to send a form of answer to be sent to Anthony. He then informed Jackson that he had sold all the lands, and then said, "*let Mr. Day settle with the purchasers now.*" "*Let us be very careful and all will be right.*"

Anthony naturally wanted a little more light, and Jackson so wrote Gould, and on Aug. 11th, 1869, Gould furnished

another perspicuous form of letter, and at the same time arranged to cheat Jackson out of a discount on the face of his bill by a time draft.

About this time it was evidently getting warm for Mr. Jackson at the other end of the line, and on August 13th, he wrote an earnest letter to Gould, which does not seem to have drawn any reply. Some further information seems, however, to have got to him in some way, for on September 22d, he wrote to Gould asking for a list of lands sold, and saying that he thought there were none except the two sections, and the three 40-acre lots.

On October 12, Gould replied, refusing to give a list, and telling Jackson "you and I should have nothing to say to Mr. Anthony or Mr. Day, except that you have sold the lands and have no more to do with the matter." "We can do ourseves no good by talking too much with the other side."

Thus this villainous scheme was accomplished. Gould not only defrauded Day out of his title to his land, but the perfidious attorney deceived his client and made him the instrument by which he put nearly eight thousand dollars into his own pocket.

The game seemed a very secure one, and it would have been secure if Jackson had not discovered the part he had been made to play, and for his own protection was compelled to disclose this precious correspondence.

To redress this wrong the action below was brought.

And after a full trial, the jury were not only justified in finding specially that Gould, at the time he sold, had knowledge of facts which informed him that plaintiff claimed these lands, and which if he had in good faith followed would have disclosed to him plaintiff's full title, but that he then knew or believed that plaintiff had title, or valid claim thereto. It was impossible that honest men could reach any other conclusion. From the very outset

he knew that if any title was in Jackson, it was there by accident or mistake, that Jackson's only claim was by way of security; that Day was claiming the lands, and as early as June 9, 1869, he referred to the very deed under which Day claimed all the lands. From the outset, he counselled concealment from Day, and he advised Jackson to set up false claims of title. In a word, fraud and guilty knowledge is written all through his letters, and there cannot be the slightest doubt that he knew that Day was the real owner of these lands. It was easy for the crafty attorney to guess what the formal defect was, and when he had consummated his infamous scheme he was then ready to say "let Mr. Day settle with the purchasers *now*."

We are now prepared to review the proceedings at the trial.

I.

In the first place, it is to be observed that the action was for *fraud*. This can seldom be proved directly, at least in all its parts and aspects. A liberal investigation of the whole transaction and of all that is closely connected with it is allowed. It is thus that courts and juries are enabled justly to survey and estimate the whole matter in question. "Actions of this description, however, where fraud is of the essence of the charge, necessarily give rise to a wide range of investigation, for the reason that the intent of the defendant is more or less involved in the issue."

Castle v. Ballard, 23 How., 187.

"In determining whether a fraud has been committed, it is always desirable to have the jury enabled to put themselves, as near as may be, in the place of the parties,

that they may fully appreciate the bearing of their conduct."

Stone v. Covell, 29 Mich., 361.

II.

The first ground of error arises on the admission of answers to the 9th, 10th and 11th interrogatories of the deposition of Cyrus F. Jackson. (Record, p. 10.)

The same ground of error is assigned on the refusal of the court to give the jury the *sixth* request of the defendant. (Record, p. 27.) It will therefore be proper to consider them together.

Anthony and wife had on April 1st, 1865 made a deed to Jackson, of which he had no knowledge at the time, and which was never formally delivered.

It is now claimed that for this reason, this deed was invalid.

A formal manual delivery is not necessary to the validity of a deed. Though it is necessary that something shall appear to show that both grantor and grantee concurred in the deed. Hence it is clear that the mere record of a deed, made and recorded without any knowledge of the grantee, will not pass title; though the great benefit accruing to the grantee has in some cases been allowed as a ground of presumption of his acceptance.

And this court holds that the grantee may by his subsequent ratification make such a deed good.

Parmalee v. Simpson, 5 Wal., 86.

In Michigan, it is expressly held that recognition of such a deed and action under it by the grantee is sufficient, and

that in such case the want of actual delivery is wholly immaterial.

Jackson v. Cleveland, 15 Mich., 94.

It was therefore both competent and important to show when the fact of Anthony's deed to him came to Jackson's knowledge, and what he done in the way of assent and ratification.

And can Gould, who, as Jackson's agent, assumed to act under this very deed, to sell and convey under it several thousand acres of land, be suffered to say that this deed did not operate for want of delivery? If anybody could say it, surely he could not.

III.

1. The point made on the admission of the answer to the 21st interrogatory (Record, pp. 10 and 11), is, as it seems to us, very unimportant. Gould's position was that of one nominally acting for Jackson. It was in reference to some lands that he was informed stood in his name that he first consulted Gould. This evidence was given solely to *identify* the lands of which he had received such information. It was a part of the *res* of his dealing with the defendant. The same fact was communicated by Jackson to Gould in the letter May 24th. And we fail to see any ground on which it was objectionable.

But even if strictly inadmissible, it was certainly harmless. By no possibility could it prejudice the defendant. If so, it is no ground of error.

2. But we think it was not only admissible for the purpose stated, but that it was admissible on another ground, though not offered for that purpose at the trial.

It shows that at the time Jackson first communicated with Gould he fully knew that Mrs. Anthony had conveyed these lands to Day; that Day claimed them; and that if they stood in his (Jackson's) name, on the record, it was by some accident or oversight. Now, enough of these facts were communicated in Jackson's letter of May 24th to have put him on further inquiry from Jackson; and if he had made one word of inquiry from Jackson he would have ascertained all the facts in full detail. It was, therefore, a proper circumstance to be put in the case, in making up the body of evidence, on which to charge Gould with deliberate fraud.

IV.

After we had traced the Harding letter to Gould's hands, and had given him formal notice to produce, and he failed to do so, or to give any further account of the paper, we had a right to prove its contents by secondary evidence. The contents, relating to this very matter, were clearly competent evidence.

1 Greenl. Ev., §§560, 582.

V.

Nor do we see what valid objection can lie to the proof of the amount paid by Gould to Jackson. (Record, page 11) If stronger proof of Gould's fraudulent intent and conduct in the transaction could be given, we do not know what it could be. It shows that he knew he was defrauding somebody besides Jackson; and the other evidence shows that he knew that person was Day.

Besides, it was a *part* of the transaction. And we had a right to give the *whole* of it in evidence, that we might enable the jury rightly to estimate its character.

See Stone v. Covell, 29 Mich., 361.

VI.

The next objections arise upon the deposition of James L. Anthony. (Record, page 18.)

1. Evidence was given to show that the Jackson deed was really made and delivered at its date; that it had been lost, thus accounting for the delay in recording it. All of these facts were proper and competent. They showed that the legal title had really passed from Jackson, and tended to relieve the plaintiff from any suspicion of a fabricated case, which might have been raised if the late discovery of this deed and its late record had been left unexplained.

Anthony was one of the witnesses to this deed; and this evidence was given *ex majore cautela*.

I can see no reason to doubt that the evidence was proper; but, if not, there was no possible way in which it could prejudice the defendant.

2. The portion of the answer to the *fifth* interrogatory, given in evidence, simply described the paper and the transaction of which the witness was speaking. It did not state the contents of a deed. It simply proved the fact that a deed was made with such specification of time, place, parties and magistrate as would serve to identify the paper.

3. We suppose it to be always competent to prove the real consideration of a deed, at least where it does not con-

flict with the consideration therein stated. It has always been so held in Michigan.

Jones v. Palmer, 1 Doug. Mich., 383.
See also DeWolf v. Rabaud, 1 Pet., 476.
Lewis v. Bell, 17 How., 618.

In Michigan there is no necessity for stating any consideration in a deed; but the same may be always proven by parol.

At the trial it seemed to be proper and important to to show that Day was the owner of these lands for a valuable consideration—not a mere voluntary grantee. It is true the deed would import a consideration, but still a real consideration formed a part of Mr. Day's title; and it was just as proper to prove this as to prove the deed itself.

This justified the evidence given by the answers to the 11th and 12th interrogatories of James L. Anthony's deposition. (Record, page 19.)

VII.

A witness, Heather, an expert in pine lands, was called to prove the value of certain of the lands in question. They had been stripped of their pine timber after Gould had sold them. It was material to the question of the value of such lands at the time of sale to know how much pine timber then stood upon them. Now after the timber is cut and removed, one of the ways, and sometimes the only way, in which the quantity of timber that stood there can be ascertained, is by an examination of the stumps and estimates therefrom. Every one at all familiar with the subject knows that pine land experts can make proximate estimates in this way. The question objected to only asked the witness whether a judgment could be

formed in this way. The answer indeed goes farther, and, implying an affirmative answer, gives the witness' estimate. But no objection was taken to the answer, and the question seems clearly proper.

Besides, the defendant is not in a position to object to this kind of evidence because it is not in the highest degree exact. Where a party by his misconduct deprives another of the means of exact proof of his loss, he cannot complain if proof less exact is accepted, if the best that is available is given. The timber was cut off in this case through the fraud of defendant, and we could resort to any evidence left us that legally tended to show the value of our land.

See 1 Greenl. Ev., § 37.

VIII.

The defendant offered in evidence the record of an attachment suit of Alfred L. Williams v. Anna D. Anthony, begun May 22d, 1871, and on which the land was sold October 18th, 1871. (Record, page 23.)

This was rightly rejected. Mrs. Anthony had no interest in the land, and at the time of the sale Day's title was perfect, not only in fact, but of record. (Record, page 12.) No purchaser, under such circumstances, could be a *bona fide* purchaser, without notice.

Columbia Bank v. Jacobs, 10 Mich., 349.

IX.

1. The answer to the *third* interrogatory of A. L. Williams' deposition was rightly rejected.

a. The whole matter was foreign to the issue of the case.

b. A large part of it is made up of a statement of the contents of papers.

2. The answers to the *seventh* and *eighth* interrogatories are so wholly foreign to the issue in the case that it does not seem necessary to discuss the point. Much of the answers are *res inter alios.*

The record was properly rejected on the following grounds:

1. It was not pleaded in abatement.
2. It is not between the same parties.
3. It was for another cause of action.
4. It was in a State Court.

Chitty on pleading, vol. 1, page 453, 454. 15th Am. Edition. Title, Outre Action Pending.

Bowne *vs.* Joy, 9 Johnson, 221.

Mitchell *vs.* Bunch 2, page 606.

Miller *vs.* Manice, 6 Hill, 115.

Logs of Mahogany, 2 Sumner, 589.

Otis *vs.* Wakeman, 1 Hill, 604.

X.

Nor can we conceive on what ground the record in Day's suit, brought in equity to recover his lands, was admissible. What would it tend to prove? Not that Gould did not do the fraudulent acts charged; for the suit was entirely based on the fact of such fraud. Nor could it prove that his fraud was not successful. The case had stopped with the pleadings, and if any inference was to be drawn, it was that that remedy for a specific recovery of the lands had failed. But as plaintiff in error has not set out the record, the court cannot tell what it contained.

XI.

The portion of the *seventh* answer offered to contradict Day, but excluded, did not tend, in any way, to contradict anything Day had testified to. It was rightly excluded.

XII.

We now proceed to consider the charge of the court to the jury.

1. Title to lands is, when the facts are proven, a matter of law, and must be determined by the court. When the title rests solely in deed, if the deeds are duly proven, it is for the court to determine whether the legal title is made out.

In this case the plaintiff showed title from the United States down to Anthony (Record, page 20); from Anthony to Jackson; from Jackson to Mrs. Anthony, and from Mrs. Anthony to plaintiff; with the exception of a few specified descriptions, which he failed to prove title to, and which failure was expressly pointed out by the court. And then the court instructed the jury that the plaintiff, in order to recover, must show title to the lands in himself at the time Gould sold them, and he farther charged the jury that the plaintiff was at that time the legal owner of said lands, except certain descriptions which he specified. The court declined to give the *first two* requests of the defendant. Together they did not state the law, and what of law they did contain was stated more clearly and accurately in the charge actually given.

No court is obliged to give a request in the words of a party, even though it is correct, if the law on that point is correctly given in a form that the court prefers.

This has been so often ruled in the Supreme Court of Michigan that the doctrine is almost elementary there.

People v. Marion, 29 Mich., 31.
Hoyt v. Jeffers, 30 Mich., 182.
Sword v. Keith, 31 Mich., 248, 261.

Besides, even the form of defendant's first request was objectionable, because it seemed to leave it to the jury to pass on the question whether the plaintiff had proven title. The court preferred, at the request of the plaintiff, to instruct on the point in a form that left no doubt.

We say, therefore, that the court was correct in instruct-

ing the jury that the plaintiff had proven his title; unless that title was destroyed by the tax deeds, of which we shall next speak.

XIII.

It seems that a considerable portion of these lands were assessed for taxes in 1866, which were not paid. They were accordingly sold for taxes in October, 1867, and, for want of other bidders, bid in by the State. On May 9th, 1868, Day bought the State bids, and on February 11th, 1869, the Auditor General made deeds of these lands to Day. (Record, pages 20, 21, 22 and 23). Of these deeds there were *seven*; but the last, being for section 13, town 12 north of range 1 west, covered the land which C. J. Anthony had sold and conveyed to Mrs. Rodgers in 1862 (Record, page 20), and which the court told the jury that the plaintiff had not shown any title to. (Record, page 28). So this deed may be put entirely aside.

There then remain *six* tax deeds made by the Auditor General to the plaintiff, February 11th, 1869, of his own land, for the taxes of 1866; and these deeds Gould offered for the purpose of showing that the plaintiff could not recover, because in June and July, 1869, he held title by said tax deeds, and hence a conveyance by Gould, as attorney of Jackson, could not injure him.

In other words, the position is that the tax deeds gave Day a new and paramount title, which extinguished all previous titles that he had, and that Gould's conveyance of Jackson's title of record could do Day no harm.

The position is an artful one; but it is also a dishonest one, and it would be marvelous if Gould could convert this into a shield to cover his fraud.

By the laws of Michigan, lands, if occupied, were taxed to the owners or occupant; if unoccupied, and not owned by a resident of the town, they were assessed as "non-resident." If the taxes are not paid, the lands are usually sold in October of the year next after the year in which they are assessed. When offered for sale, if there are no other bidders, they are bid off for the State; but though so bid off, they continue to be taxed as before. A year's redemption from the time of sale is allowed, and the owner is permitted to pay the tax, all legal charges, and a certain interest, and the sale is discharged. The bids made by the State could also be bought from the Auditor General, and in such case, after the year of redemption has expired, the Auditor General may issue a deed to the purchaser.

It was such State bids that Mr. Day acquired in May, 1868, and upon them deeds were made to him Feb. 11th, 1869. It will be noticed the taxes were already assessed and due when Day acquired his title, Sept. 2d, 1867, and the sale took place a few weeks thereafter. In May following, while the sale was still subject to redemption by Mr. Day, he bought the State bids.

Now, it is clear that Day did this for the protection of his existing title, and not for its extinction. His act was as owner, and not as a stranger-purchaser. If he had *redeemed* there could be no question. It would clearly have operated as a payment of the tax, and the conditional *lien* of the State, under the tax assessment and sale, would have been discharged.

Now, it is the duty of the owner to pay the tax. And no matter what form it takes, whenever such owner *pays to the State* all claim that it has on account of such tax, it is in *legal effect* a payment of the tax. It is absurd to say that it shall operate to divest the title *from* him, only to place it back *in* him. When a tax sale and deed really

transmits title, it operates *adversely* to the owner, and transfers his title to another. A real owner of land, bound to pay the tax, clearly cannot strengthen his title, nor acquire a new one, by suffering his tax to remain unpaid and becoming a purchaser at a sale therefor. Such cannot be the theory of any tax system, certainly not that of Michigan.

The principles above stated may be said now to be almost elementary in the law of Michigan.

In a very early case, *Lacey v. Davis*, 4 Mich., p. 154, the Court said the payment of taxes was an "obligation incident to every title." In *Butler v. Porter*, 13 Mich., p. 302, the Court say, "The duty springs from the ownership." In *Cooley v. Waterman*, 16 Mich., p. 372, the Court repeats its previous language, "The duty springs from ownership." In *Dubois v. Campau*, 24 Mich., p. 368, it is said, "It may be regarded as settled in this State that one in possession of land, claiming it as his own, is bound to pay the taxes imposed upon it." In *Blackwood v. Van Vliet*, 30 Mich., p. 123, the Court said, "When lands are occupied, our statutes have always required them to be assessed to the owner or occupant, and when thus assessed, it becomes a duty which the person assessed owes to the State to make payment. If not occupied, the owner owes to the State a like duty."

It thus plainly appears settled in Michigan that payment of his taxes is a duty which the owner of land owes to the State; a proposition so plain that judicial decision was hardly necessary.

It may be proper here to notice that in the last case a limitation was suggested to the obligation to pay taxes arising from *mere* possession; it was suggested that there must be some duty connected with the possession to require the payment of taxes. This, however, is wholly unimportant here.

It follows that where the payment of taxes is a duty, it matters not what *form* is adopted, the legal effect is the same. The owner, by suffering a tax sale and becoming the buyer, neither strengthens nor weakens his original title.

Thus, in *Lacey v. Davis*, 4 Mich., p. 152, the Court, speaking of attempts of one in possession to acquire new rights under a tax sale, said, "If his possession is adverse to plaintiff, and under color of title, every act of his which is in obedience to a law imposing such burden upon the land, must be regarded as done by him, by *reason of his own claim of title, and in protection thereof; and he cannot thereby acquire a new or superior title, as every such act is deemed to be subordinate to his own title, and cannot be adverse to it.*" And again, (pp. 153–4), "Raynor was bound in virtue of such possession, to discharge the lien [for taxes] for the protection of the title under which he occupied. By a voluntary payment he would not strengthen his title, *and by suffering the land to be condemned and sold he could, as we have seen, neither strengthen it nor acquire a new one.*"

It would seem impossible to contend for any other view in respect to the real owner. So far as he is concerned, the law does not intend to affect him except to bind him and his land to the payment of his tax, or if he fails, to authorize the State, acting adversely on his title, to transfer the title to another. It is not intended to strengthen or weaken his own title; nor will any act that he does which amounts to a payment of the tax, be held to affect his title. Nor can it be conceived that where the owner finds that his land has been sold and bid in by the State, and he buys the bid from the State, he thereby supposes he destroys his original title. It is plainly an act done for the saving of his title.

In *Dubois* v. *Campau*, 24 Mich., p. 370, the court said that if one bound to pay a tax should suffer it to be sold to

another, and subsequently buys the right of the purchaser, such "payment to the purchaser and conveyance to himself, would operate merely as *a payment* of the tax, and give him no greater rights than if he had paid it when it became due, as it was his duty to have done."

The *italics* are by the court.

The court, in the same case, p. 370, speaking to the point, of a tax sale, suffered by a tenant, who afterwards acquires this title, says, "when he purchases in the title, he and the former owners, are *remitted to their original position and rights as they stood before the sale, and as they would have stood had the taxes been paid when due*, or *had the sale for the taxes been made directly to the party in default.* Such we think must be the result on principle."

In a series of cases, the Supreme Court of Michigan have held that no title rights were lost or acquired by an owner, or other person, whose duty it was to pay the taxes, but who suffered them to be sold and thus got a formal tax deed.

Several of these cases have been cited, but I here give them in their order.

Lacy v. Davis, 4 Mich., 161.
Page v. Webster, 8 Mich., 263.
Butler v. Porter, 13 Mich., 292.
Cooley v. Waterman, 16 Mich., 366.
Dubois v. Campau, 24 Mich., 368.
Blackwood v. VanVliet, 30 Mich., 119.

In Cooley on Taxation, p. 346, it is said "there is a general principle applicable to such cases, that a purchase made by one, whose duty it was to pay the taxes, shall *operate as payment only.*"

In Choteau v. Jones, 11 Ill., 322, the court, speaking of a tax sale purchase by one Jones, said, "He was then one of the owners of the land, and as such bound to pay the

taxes assessed upon it. *The purchase was but a mode of paying the taxes* legally chargeable against him."

In several other States the same doctrine has been expressly held.

Moss v. Shear, 25 Cal., 45.
McMain v. Whelan, 27 Cal., 318.
Garwood v. Hastings, 38 Cal, 223.
Smith v. Lewis, 20 Wis., 354.
Bassett v. Welch, 22 Wis., 176.
Varney v. Stevens, 22 Me., 331.

There are many other cases which hold views leading to the same result.

And such seems to have been the view of this court in Balance v. Forsyth, 13 How., 18.

There is another familiar doctrine which would bring us to the same conclusion. A man cannot ordinarily have a lien on his own estate; the less merges in the greater. Equity, it is true, will sometimes, for special reasons, and to prevent a failure of justice, keep such a lien outstanding, and prevent the merger.

Now, after a sale, and while the right of redemption exists, the tax sale creates only a *lien* on the owner's title. The owner's purchase of that lien operates to merge it, *eo instanti*, in his general title.

The tax transaction in this case was wholly between the State and the owner of the lands in question. The State had a tax on the lands, secured by a lien on the same, which tax it was the owner's duty to pay. The State received from the owner the amount of its tax claim; that was the end of the tax, and of course the end of the lien that secured it. The tax was paid. This seems to be the plain reason of the whole matter.

It is probably wholly immaterial why Mr. Day preferred to take the State bids instead of redeeming. It may

have been accidental. Or he may possibly have thought the tax deeds would in some way strengthen his title; or, at least, *apparently* strengthen it. But this does not change the legal effect of the transaction. It is clear that Mr. Day, in buying the State bids, never thought he was thereby impairing or destroying his original title. It is also equally clear that the law would not suffer him to set up these tax deeds to the prejudice of any one else interested in the integrity of his title. The law forbids it, as against justice and reason. Yet Gould comes and asserts it in behalf of fraud and pillage. Such a claim is in plain contempt of law, justice and reason. Certainly this court can have no hospitality for such a claim.

One word more. In the court below, as a sort of excuse or justification of Gould, it was insinuated that Mr. Day's refusal to pay Jackson's claim had led to the conduct of Jackson and Gould. The insinuation has no just ground. It happens that there is enough in the record to repel it. Jackson's dealings in the matter of his services and time were wholly with C. J. Anthony. In his letter of June 15th, 1869 (Record, page 14), he says he never saw Day but once; that he has Anthony's letter showing how long he worked and what he was to have; that he had given a receipt in full, which had been delivered to Anthony, and by Anthony handed over to Day. Anthony evidently handed it over to Day as a voucher on his settlement with him. When, in 1869, it was brought to Day's knowledge that Jackson still set up a claim, he asked him, through James L. Anthony, to make out his bill, that it might be settled. Of course this has nothing to do with the issue in the case; but the circumstances may justify these remarks.

We respectfully submit that the judgment below should be affirmed.

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